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BEING

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DECIDED UNDER THE

## WORKMEN'S COMPENSATION ACT, 1897,

PRINCIPALLY TAKEN FROM THE

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HIS HONOUR JUDGE STONOR,

THE SENIOR JUDGE ON THE ENGLISH BENCH,

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WITH HIS PERMISSION,

RESPECTFULLY DEDICATED.

# PREFACE.

THE suggestion of publishing these Reports came from the learned judge to whom they are dedicated. He thought that the collected decisions of the Court of Appeal would be of great assistance to those who, under considerable disadvantage, have to interpret the Act in the first instance.

The utility of having all the cases under the Act in one handy volume, with cross references and a copy of the Act at the end, must be unquestionable. The adoption of the excellent reports from the *Times Law Reports* and the *Times* has the advantage of being able to reproduce a greater number of the decisions in the Court of Appeal, and also a few of the more important County Court cases. Among these latter appear some that would not be available but for the courtesy of the proprietors of the *Law Times.*

In framing the headnotes an attempt has, in some instances, been made to present the principle involved rather than the exact point of law upon the particular facts. Other Reports are referred to, and some editorial comments appear in the footnotes.

It is proposed to cite these Reports as "W. C. C."

The effect of these cases has been embodied in a little book just published, "The Case Law of the Workmen's Compensation Act," which is intended to supplement "Accidents to Workmen," and it is hoped that the present volume may prove a useful, if not an indispensable, adjunct to that work.

THE EDITOR.

# TABLE OF CASES.


PAGE

AIRD, Bennett *v.* . . . . . 138
Appleby *v.* Horseley Co. . . 103
Atlantic Transport Co., Woodham *v.* . . . . . 52
Avis, Burrell *v.* . . . . . 129

BARROW Haematite Steel Co., Keast *v.* . . . . . 99
Bedworth, Matthews *v.* . . . 124
Belsey *v.* Sadler . . . . . 141
Bennett *v.* Aird . . . . . 138
Billings *v.* Holloway . . . . 59
Brown *v.* L. & N. W. Ry. . . 147
Brown, Powell *v.* . . . . . 44
Brown *v.* Scott . . . . . 11
Burrell *v.* Avis . . . . . 129

CHAMBERS, Flowers *v.* . . . . 51
Chambers *v.* Whitehaven Harbour Commissioners . . . 47
Chandler *v.* Smith . . . . . 19
Clayton, McLaughlin *v.* . . . 116
Coleman *v.* S. E. Ry. . . . . 151
Commissioners of Inland Revenue, Lancashire Insurance Co. *v.* . . . . . 38
Commissioners of Inland Revenue, Vulcan Boiler Co. *v.* 40
Counsell, Stack *v.* . . . . . 133
Crouch, Watkinson *v.* . . . . 137
Cude, Silvester *v.* . . . . . 120

DAVIES *v.* Main Colliery Co. . 92
Davis, Irons *v.* . . . . . 26
Dawson, McNicholas *v.* . . . 80
Duncan, Williams *v.* . . . . 123

PAGE

Durrie *v.* Warren . . . . . 78

EDWARDS *v.* Godfrey . . . . 32

FLOWERS *v.* Chambers . . . . 51

GODFREY, Edwards *v.* . . . . 32

HADDOCK *v.* Humphreys . . 117
Hall *v.* Snowden . . . . . 73
Hall *v.* Snowden . . . . . 114
Hoddinott *v.* Newton Chambers & Co. . . . . 62
Holloway, Billings *v.* . . . . 59
Holness *v.* Mackay . . . . . 13
Horseley Co., Appleby *v.* . . 103
Humphreys, Haddock *v.* . . . 117

IBBOTSON, Lowth *v.* . . . . 46
Irons *v.* Davis . . . . . 26

JONES *v.* Ocean Coal Co. . . 94
Jones *v.* Walker . . . . . 142

KEAST *v.* Barrow Haematite Steel Co. . . . . 99
Keen, Skeggs *v.* . . . . . 35
Keen, Skeggs *v.* . . . . . 119

LANCASHIRE Insurance Co. *v.* Commissioners of Inland Revenue . . . . . 38
Lancashire and Yorkshire Ry., Smith *v.* . . . . . 1
London & North-Western Ry., Brown *v.* . . . . . 147

PAGE

Lowe v. Pearson . . . . . 5
Lowth v. Ibbotson . . . . . 46

MACKAY, Holness v. . . . . 13
Main Colliery Co., Davies v. . 92
Marsden, Price v. . . . . 108
Matthews v. Bedworth . . . 124
McIver, Medd v. . . . . 76
McLaughlin v. Clayton . . 116
McNicholas v. Dawson . . . 80
Medd v. McIver . . . . . 76
Mellor v. Tomkinson . . . 57
Mountain v. Parr . . . . . 110

NEWTON Chambers & Co., Hoddinott v. . . . . 62
Nunnery Colliery Co., Rumboll v. 28

OCEAN Coal Co., Jones v. . . . 94

PARR, Mountain v. . . . . 110
Pearson, Lowe v. . . . . 5
Powell v. Brown . . . . . 44
Price v. Marsden . . . . . 108

REES v. Richards . . . . . 118
Rees v. Thomas . . . . . 9
Richards, Rees v. . . . . 118
Rumboll v. Nunnery Colliery Co. 28

SADLER, Belsey v. . . . . 141

PAGE

Scott, Brown v. . . . . 11
Silvester v. Cude . . . . . 120
Simmons v. White . . . . . 89
Skeggs v. Keen . . . . . 35
Skeggs v. Keen . . . . . 119
Smith, Chandler v. . . . . 19
Smith v. Lancashire and Yorkshire Ry. . . . . 1
Snowden, Hall v. . . . . 73
Snowden, Hall v. . . . . 114
South Eastern Ry., Coleman v. 151
Stack v. Counsell . . . . . 133

THOMAS, Rees v. . . . . 9
Tomkinson v. Mellor . . . 57

VULCAN Boiler Co. v. Commissioners of Inland Revenue . 40

WALKER, Jones v. . . . . 142
Walsh, Wood v. . . . . 68
Warren, Durrie v. . . . . 78
Watkinson v. Crouch . . . 137
Whitehaven Harbour Commissioners, Chambers v. . . . . 47
White, Simmons v. . . . . 89
Williams v. Duncan . . . 123
Woodham v. Atlantic Transport Co. . . . . 52
Wood v. Walsh . . . . . 68

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# CASES

DETERMINED BY

# THE COURT OF APPEAL

ON APPEAL FROM THE COUNTY COURT.

---

## SMITH AND ANOTHER *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

(1898.) 15 *T. L. R.* 64.

*Arising out of and in the Course of the Employment—Act done for Pleasure, and not in Master's Interest.*—SECT. 1, 1.

An accident that occurs to a workman while doing something for his own pleasure foreign to his duty and his employer's interest, does not arise out of and in the course of the employment.

THIS was an appeal by the defendants from the decision of Judge Bompas, Q.C., sitting at the Colne County Court, on proceedings taken under the Workmen's Compensation Act, 1897, to recover compensation for accidental injuries suffered by a workman in the course of his employment, and resulting in his death. The deceased man Smith was a platelayer in the employment of the defendants, the Lancashire and Yorkshire Railway Company, and he was also sometimes employed to collect tickets at Nelson Station.

The evidence was that on the night of the day of the accident the deceased had been engaged in collecting tickets from the last train passing along the line that night. While the train was still standing at the platform a constable named Lightowler came on to the platform in order to travel by the train. It appeared that passengers travelling from Nelson were required to give up their tickets before the train started. The deceased, having let Lightowler into the train, asked whether he had given up his ticket, and shouted along the platform to a porter the question whether the ticket had been given up, to which the answer was returned that it was all right. The deceased then, standing on the footboard, said to a lady passenger, "I wish I was going with you to Colne." There was some uncertainty as to whether the deceased was already on the footboard when he asked the question about the ticket, or whether he got on to the footboard afterwards merely for the purpose of speaking to the lady. The train was then in motion, and in getting off the footboard he in some way caught his foot and fell, and was crushed between the platform and the train, and was killed. The County Court Judge arrived at the following finding of facts:—1. That the deceased was on the day in question in the employment of the defendants, and his day's duty was not finished at the time of the accident. 2. That after he had finished collecting the tickets he stood on the platform, and he let Lightowler into the carriage, and asked and was answered with respect of his ticket before the train was started. 3. That after the train was started, and probably in consequence of its starting, he got on to the footboard to say to the lady, "I wish I was going with you to Colne." 4. That this was not obviously dangerous, and did not amount to wilful and serious misconduct of the deceased. The County Court Judge also found as a fact that the deceased did not get on to the footboard for any object of the defendants', but only for his own pleasure. The Judge held that the accident arose in the course of the deceased's employment, because it was during the time he was being

paid for attendance at the station, and while he was not neglecting in any way his duty for purposes of his own. He also held, though with doubt, that the accident arose out of the deceased's employment, because it was an accident happening to him from the train about which his duties were concerned, and that, though the danger was increased by the mode in which he was behaving, this in the absence of wilful and serious misconduct did not prevent its arising out of his employment. The County Court Judge accordingly awarded to the plaintiffs £160, the sum which had been agreed upon between the parties. The plaintiffs were the widow and the stepdaughter of the deceased. Section 1, sub-section 1, of the Workmen's Compensation Act, 1897, is as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

Mr. *C. A. Russell*, Q.C. (Mr. *Acton* with him), appeared for the defendants in support of the appeal, and contended that on the findings of the County Court Judge the defendants were entitled to judgment.

Mr. *A. T. Lawrence*, Q.C. (Mr. *F. H. Mellor* with him), for the plaintiffs, contended that the judgment of the County Court Judge was right. The plaintiffs had brought the case within the statute. The accident arose both out of and in the course of the employment of the deceased. It could not be the duty of the Court to consider what was the actual motive of the deceased at the time of the accident. The Act did not say that the accident must happen to the workman in the discharge of his duty.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion in cases under the Workmen's Compensation Act the Court of Appeal only had jurisdiction to entertain questions of law. Here the County Court Judge had found certain facts, and the

company appealed on the ground that on those facts the deceased was not brought within the Act. One of those findings was that the deceased did not get on to the footboard for any object of the defendants', but only for his own pleasure. The Act made masters insurers against accidents happening to their workmen, but only in the case of events mentioned in the Act. Section 1 began with the words, "If in any employment to which this Act applies." That led them to section 7, which said that the Act should apply to employment by the undertakers as thereinafter defined, on, or in or about a railway, etc. The deceased was employed on or about a railway, and he was therefore in an employment to which the Act applied. Section 1 then proceeded, "personal injury by accident arising out of and in the course of the employment is caused to a workman," then his employer shall be liable. It must be shown that the accident arose both out of and in the course of the employment. He would not decide whether or not in this case the accident arose in course of the employment of the deceased. But having regard to the finding of the Judge that the deceased got on to the footboard not for any object of the defendants' but for his own pleasure, it seemed to him impossible to say that the accident arose out of his employment. He therefore thought the appeal must be allowed.

LORDS JUSTICES RIGBY and COLLINS delivered judgment to the like effect.

Also reported in (1899) 1 Q. B. 141; 68 L. J. Q. B. 51; 79 L. T. 633; 47 W. R. 146.

## LOWE *v.* PEARSON.

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

(1898.) 15 *T. L. R.* 124.

*Arising out of and in the Course of the Employment—Disobedience to Orders.*—SECT. 1, 1.

A lad was employed to hand balls of clay in moulds to a moulder, and was told not to touch the machinery. Having nothing to do for the moment, he attempted to clean the machinery, and was thereby injured. The accident did not arise out of and in the course of the employment.

THIS was an appeal from the decision of Judge Smyly, Q.C., on proceedings taken in the County Court to recover compensation under the Workmen's Compensation Act, 1897. The appellant, Pearson, was the owner and occupier of certain pottery works, being a factory within section 7 of the Workmen's Compensation Act, 1897; and the respondent, Lowe, was a boy of the age of 14 years in the appellant's employment. The respondent was employed in the pottery works as a clay ball maker, his duty being to make the clay into a ball, put the ball into a mould, and hand the mould to a woman at work at a machine. The woman's duty was to put the mould on to the machine, on which were two cones revolving in opposite directions. Express instructions were given to the boy not to interfere with the machine, and if the machine wanted cleaning it was the duty of a particular workman to clean it. Upon the day in question the woman who was working at the machine, being in want of clay, went away to get some, and the respondent, in her absence, attempted to clean the cones, when the fingers of his right hand were caught between the cones and he lost his little finger and the third finger was injured. Upon a claim by the respondent for compensation under the Workmen's Compensation Act, 1897, the County Court Judge found as

follows: "(1) Course of his employment. I decide that, though I find as a fact it was against rules that the plaintiff" —the present respondent—"should clean the cones, and that he attempted to clean them knowing that it was not his duty, yet that the injury was received by an accident arising out of his employment." "(2) Though I find as a fact that he knew it was against orders for him to clean the cones, and that he went about the cleaning in a careless and reckless manner, yet that the plaintiff was attempting to clean the cones with the view of furthering the work, and that his conduct did not, in my opinion, amount to serious and wilful misconduct." He accordingly assessed the compensation at 2*s.* a week from 14 days after the accident.

Mr. *C. A. Russell*, Q.C., and Mr. *Etherington Smith* for the appellant, contended that the accident did not arise "out of and in the course of the employment," within section 1, subsection 1, of the Workmen's Compensation Act, 1897. The boy was expressly forbidden to clean the cones, and in attempting to clean them he was acting outside his employment altogether. To come within the above words the workman must be engaged in doing something which he was employed to do, or in doing something incidental thereto. A servant could not make that a part of his employment which his master had not employed him to do, or which was not incidental to his employment. The question whether, in attempting to clean the cones, the boy was acting with the view of furthering the work was immaterial upon this question. As between the master and the servant, the servant could not extend the scope of his employment by doing that which he thought would further his master's work. There was no question raised here of any emergency. They referred to *Smith* v. *Lancashire and Yorkshire Railway Company* (*ante*, p. 1) and *Engelhart* v. *Farrant & Co.* ([1897] 1 Q.B., 240).

No one appeared for the respondent.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the boy was injured

while employed in a factory within section 7 of the Workmen's Compensation Act, 1897, and the question was whether the accident arose "out of and in the course of the employment." He wished to say that this was not a case of a man doing something on an emergency outside what he was employed to do, and he desired to reserve that case. This boy was employed in manual labour, his duty being to make the clay balls and hand them to the woman at the machine. The boy had nothing to do with the machine. His employer told him not to touch the machine, and there were express orders against his doing so. In spite of his orders he meddled with the machine and was injured. It was no part of his duty to clean the cones. It was said that his conduct did not amount to serious and wilful misconduct, because what he did was for the purpose of furthering the work. That, however, could not affect the question whether the injury arose out of and in the course of his employment. His employment was to make the balls of clay and hand them to the woman, and he was expressly ordered not to touch the machine. A master might well employ a boy of 14 to make balls of clay and hand them to the woman at the machine, whereas it would be a very different thing to employ him on that which would bring him into contact with the machine. His Lordship based his judgment on the facts that the boy was ordered not to touch the machine, that he knew he was not to touch it, that he was only employed to make the clay balls, and that he had nothing whatever to do with the machine. The appeal must therefore be allowed.

LORD JUSTICE RIGBY said that this was a proceeding instituted by an infant to obtain compensation under the Workmen's Compensation Act, 1897, and the infant was, unfortunately, not represented before this Court. Therefore, in accordance with the traditions of the Court of Chancery that the Judge should take especial care that the interests of the infant were not prejudiced, he had tested very closely the arguments of the counsel for the appellant, but with all

possible care on behalf of the infant he could not find that the employer was liable in this case. They knew what this boy's duties were. His duties were confined to the preparation of the clay balls for the woman who was working the machine, and he was expressly told not to meddle with the machine—that was to say, he was not to clean the machine. The duty of cleaning the machine was not entrusted to the woman, that duty being entrusted to another servant who would be more likely to do it safely. For that purpose some knowledge of the machine was necessary, and this lad knew nothing about it. Consequently, directly he attempted to do it he got involved in difficulties. This was not an accident arising out of and in the course of the employment within section 1, subsection 1, of the Act.

LORD JUSTICE COLLINS concurred. If on the facts in this case they were to hold that the employer was liable, they would have to cut out of section 1, subsection 1, of the Act the words "arising out of and in the course of employment." They must first ascertain what was the employment of this boy. When that was ascertained, the injury brought about by this act of the boy attempting to clean the machine was excluded from the words "arising out of and in the course of employment." His employment was to perform a purely unskilled piece of manual labour, and he had nothing to do with the machine, and if he chose to meddle with the machine, any injury from an accident resulting to him therefrom did not arise out of and in the course of his employment.

LORD JUSTICE A. L. SMITH: Do you ask for costs, Mr. Russell?

Mr. *C. A. Russell:* No, my Lord. My client does not ask for costs.

Solicitors: *Stevens, Son, & Parkes, for Jones & Middleton, Chesterfield.*

Also reported in (1899) 1 Q. B. 261; 68 L. J. Q. B. 122; 79 L. T. 654; 47 W. R. 193. See *Rees* v. *Thomas* (*post*, p. 9); *Brown* v. *Scott* (*post*, p. 11); *Rumboll* v. *Nunnery Colliery Co.* (*post*, p. 28); *Matthews* v. *Belworth* (*post*, p. 124).

## REES *v.* THOMAS.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 301.

*Arising out of and in the Course of the Employment—Scope of Employment —Master's Benefit—Emergency.*—SECT. 1, 1.

Authority for a servant to act on an emergency in his master's interest may be implied. Where a workman was injured in attempting to stop his master's runaway horse, it was held that the accident arose out of and in the course of the employment, although his work was wholly unconnected with the horses.

THIS was an appeal by the employer from an award made by the Judge of the Bridgend County Ccurt in favour of the widow of a deceased workman under the Workmen's Compensation Act. The deceased was a miner in the employment of the appellant, who was a colliery proprietor, and belonged to the class called firemen. One of his duties was to examine the mine from time to time and make reports. On the day of the accident he had examined the mine, and found it in a proper state, and, having made a report in writing, it was his duty to take his report to an office, which was about half a mile distant from the pit's mouth. Some trucks loaded with ashes were just about to start, drawn by a horse, along a tramway in the direction of the office. The deceased, in breach of one of the rules of the colliery, got upon one of the trucks in order to have a ride. While the trucks were proceeding, the horse took fright at something and bolted. The deceased jumped off the truck and tried to stop the horse, and in so doing he was run over and killed. The County Court Judge found as a fact that the deceased, though acting in breach of a rule, had not been guilty of serious and wilful misconduct within the meaning of section 1, subsection 2 (*c*), of the Act.

Mr. *Ruegg*, Q.C., and Mr. *Sankey*, for the appellant, argued that the accident did not arise out of and in the course of the employment of the deceased. He had acted entirely as a volunteer, being under no legal duty to try to stop the horse, though, perhaps, he had a moral duty to do so. It must be shown that the accident arose out of work which, as between the workman himself and his master, he had been engaged to perform and had contracted to perform.

Mr. *C. A. Cripps*, Q.C., and Mr. *W. D. Benson*, for the respondent, were not called upon to argue.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said the point raised here had been touched upon in *Lowe* v. *Pearson* (*ante*, p. 5). In that case it was held that the applicant, who had interfered with machinery with which he was forbidden to interfere, was not entitled to compensation. But his Lordship there expressly said that that was not the case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master.

LORDS JUSTICES COLLINS and ROMER concurred.

Solicitors: *Bell, Brodrick, & Gray, agents for T. J. Hughes, Bridgend, for the appellant; Riddle, Vaizey, & Smith, agents for Walter Morgan, Bruce, & Co., Pontypridd, for the respondent.*

*Smith* v. *Lancashire and Yorkshire Railway* (*ante*, p. 1); *McNicholas* v. *Dawson* (*post*, p. 80); and *Englehart* v. *Farrant* (1897), 1 Q. B. 240, were cited.

Also reported in (1899) 1 Q. B. 1015; 68 L. J. Q. B. 539; 80 L. T. 578; 47 W. R. 504.

See *Lowe* v. *Pearson* (*ante*, p. 5); *Brown* v. *Scott* (*post*, p. 11); *Rumbolt* v. *Nunnery Colliery Co.* (*post*, p. 28); *Matthews* v. *Bedworth* (*post*, p. 124).

## BROWN *v.* SCOTT.

Before A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.

*The Times, June* 12, 1899.

*Arising out of and in Course of Employment.*—SECT. 1, 1.

If a boy of 13 years of age, whose duty is to do all sorts of things under the direction of a foreman, is untruly told by another man that the foreman has said he was to do certain work, and the boy does it, there is evidence that he was working in the course of his employment. Vaughan Williams, L.J., dissentiente.

THIS was an appeal from the award of the Judge of the Durham County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant was a boy of the age of 13. The evidence showed that he was engaged by a foreman named Holmes to work for his employer. His work was to carry picks. He also acted as signal boy to a crane worked by Holmes. He also trimmed lamps, and a fortnight before the accident he oiled a crusher by Holmes's orders. On the day of the accident Holmes ordered him to carry water, and after dinner to gather bags. The employer was at the time engaged in making a reservoir, and there were a number of sheds in which were machinery. A man named Ebden, who was in the same employment, but not under Holmes's orders, was in charge of a machine in one of the sheds. Ebden told the boy he was to oil his machine. The boy asked, "Who says so?" Ebden answered, "Your boss," meaning Holmes. Holmes had not in fact given any such order. The boy objected to oil the machine while it was in motion, but Ebden refused to stop the machine, and told the boy to get on or he would tell Holmes. The boy proceeded to oil the machine, and while so doing, his foot slipped and

he sustained injuries. The County Court Judge thought that, although oiling the machine was not part of the applicant's regular work, yet, as he did so pursuant to Ebden's orders, the accident arose out of and in the course of his employment, and he made an award in the applicant's favour. The employer appealed.

Mr. *Ruegg*, Q.C., and Mr. *Hans Hamilton* appeared for the appellant; Mr. *Shortt*, for the respondent.

The COURT dismissed the appeal, Lord Justice Vaughan Williams dissenting.

LORD JUSTICE A. L. SMITH said the question was whether there was any evidence on which the County Court Judge could find that this accident arose out of and in the course of the boy's employment. The evidence showed that his duties were not confined to any particular part of the place where the work of making this reservoir was going on. He seemed in fact to be a jack-of-all-trades, and the oiling of machines seemed to have been at least one of his various duties. He could not say that there was no evidence to support the finding of the County Court Judge, and therefore in his opinion they ought not to upset it.

LORD JUSTICE RIGBY delivered judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS said he was sorry to differ from the other members of the Court, but he thought there was no evidence to support the finding of the County Court Judge. It seemed to him that to hold there was such evidence was equivalent to holding that in all cases where a boy was employed in a factory and was asked by some one senior to himself to do something which was not within his regular duties, that made what he so did something done by him in the course of his employment.

See *Lowe* v. *Pearson* (*ante*, p. 5); *Rees* v. *Thomas* (*ante*, p. 9); *Matthews* v. *Bedworth* (*post*, p. 124).

## HOLNESS *v.* MACKAY & DAVIS.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 351.

*Arising out of and in the Course of the Employment—Going to Work.*—SECT. 1, 1.

An accident that occurs when a man is passing along a public highway on his way to the place where he works is not one arising out of and in the course of the employment. *Quære* whether it would be so if, instead of a highway, it occurred at a place over which the employer had control.

A railway company allowed the workmen of a firm who had contracted to do some work for them to pass along a path beside the line. The path was separated from the main line by several lines of metals. One foggy morning, seven minutes before the time for commencement of work, a workman was run over on the main line about 150 yards from the place of his work.

*Held* (Romer, L.J., dissentiente), that the accident did not arise out of and in the course of his employment.

THIS was an appeal from an award of Judge Owen, the Judge of the Newport County Court, upon proceeding to assess compensation under the Workmen's Compensation Act, 1897. The appellants, Messrs. Mackay & Davis, were contractors, and the respondent was the widow of a workman who was killed by an accident while in the appellants' employment. The appellants had entered into a contract with the Great Western Railway Company to widen the company's line of railway between Newport and Cardiff. The deceased man, Holness, was a ganger employed on the work by the appellants, and the gang of which he was in charge was engaged in ballasting a siding at a place on the south side of the main line at a distance of about 800 yards from the Cardiff end of the tunnel, just outside Newport Station. The deceased lived at Newport, and upon the morning of November 12, 1898, he was walking from his home to his

work along the down main line when he was killed by an express train at a spot about 150 yards from where his work was. The time of the accident was 6.53 a.m., and the weather was foggy. The work upon which the deceased was engaged at the sidings was to commence at 7 a.m. In order to get to his work deceased had to come upon the line of the Great Western Railway, and there were only two places where he could get upon the line and pass along it to his work—namely, the Waterloo gate on the south side of the line, and the Maesglas gate on the north side. If the deceased used the Maesglas gate he would have had to cross the main lines to get to his work. He was told by the appellants' foreman to get upon the line by the Waterloo gate, which was the most convenient gate for him. There was no evidence either as to the gate by which the deceased got upon the line upon the morning in question or as to which gate he commonly used. The question was whether the accident arose out of and in the course of the deceased man's employment. The County Court Judge drew the inference that the deceased man on the morning in question got upon the line by the Waterloo gate, and that it was part of the deceased man's contract of service that he should go to his work along the line of railway; and he came to the conclusion that the deceased began his day's work as soon as he got upon the railway line for the purpose of going to his work, as it was part of his duty to do so, and that, therefore, the accident arose out of and in the course of his employment. He also came to the conclusion that, even if the deceased got upon the line by the Maesglas gate, the accident was not the result of his getting upon the line at that place. In his opinion, by whatever gate the deceased got upon the line, he had begun his day's work when he got upon the line, and the deceased was killed by an accident arising out of and in the course of his employment. He assessed the compensation at £250 18*s.*, one half to go to the widow and the other half to be for the benefit of the two children.

Mr. *Ruegg*, Q.C., and Mr. *A. J. David*, for the appellants,

contended that the accident did not arise out of and in the course of the employment, inasmuch as the deceased man had not arrived at the place where he and his mates were about to commence work, and the accident happened before the time when the work was to commence. The going to and from his work was not a risk of the employment which the employers undertook. Nor was this an "employment by the undertakers on, or in, or about a railway," within section 7, subsection 1, of the Act of 1897. The word "undertakers" was defined in section 7, subsection 2, as meaning, in the case of a railway, the railway company. The deceased man was not employed by a railway company, but by contractors.

Mr. *Montague Lush*, for the respondent, said the only question raised before the County Court Judge was whether this accident arose out of and in the course of the employment of the deceased. He did not contend that in every case where a workman was injured on his way to his work the Act applied. Each case depended on its circumstances. In this case there was no ground for interfering with the decision of the County Court Judge.

The COURT allowed the appeal, LORD JUSTICE ROMER dissenting.

LORD JUSTICE A. L. SMITH said that this case raised an important question—viz. whether an employer was liable under the Workmen's Compensation Act for injuries sustained by a workman while on his way to his work. He could not assent to that as an abstract proposition, for he could not say that injuries sustained by a man while he was going to his employment arose out of his employment on, or in, or about the railway, factory, or other locality where the employment took place. In this case the appellants, who were contractors, had undertaken the work of ballasting a siding, which was at the side of the Great Western main railway line, and the deceased man was engaged by them on that work. The contractors had control over the siding, but they had no control over the main line on which the man was killed. There were

two ways by which the deceased man might have gone to his work. One was by the Waterloo gate, in which case it would not have been necessary for him to get on to the main line. The other was by the Maesglas gate, and, if he went that way, he would have to cross the main line. He was found dead on the main line, having apparently walked along it for some distance, and then been run over and killed. Did the accident arise out of and in the course of his employment? His employment was on the siding, and it was no part of his contract of employment that he should go to his employment by any particular way. While he was going to his work and before the hour at which his work was to commence, he met with his death. It was plain that he had not got to his work, he was going to it, and he was not yet on the locality where his work was to be done. It was said that this case resembled that of a workman being killed by some accident in a large quarry while on his way to his work in a particular corner of the quarry, or of a man whose employment was on the upper floor of a factory meeting with an accident in the lower part of the building while on his way to his work. But in those cases the employer would have control of the whole quarry or factory. He thought that this case was different, and was more similar to that of a man meeting with an accident while going along a highway to his work. He could not see that there was in this case any contract between the employer and the workman that the employment should extend so as to embrace within it something which happened some time before the hour at which the work was to commence and not on the locality in which the work was to be done. He came to the conclusion that the County Court Judge had decided the case wrongly, and he thought that the cases of *Brydon* v. *Stewart* (2 McQueen, 30) and *Tunney* v. *Midland Railway Company* (L.R., 1 C.P., 291), to which the County Court Judge referred in his judgment, did not support his decision. In his opinion, therefore, the appeal should be allowed.

LORD JUSTICE VAUGHAN WILLIAMS agreed. The accident

in this case happened before the time when by the contract between the parties the workman's work was to begin, and before he arrived at the place where the work was to be done. The County Court Judge was of opinion that, as a general proposition, a man's employment does not begin until he gets to the place where he has to do his work, but he seemed to have thought that the duration of employment might be amplified by reason of the nature of the employment; and he found that in this case a state of things existed which involved some duty on the part of the employer towards the workman even before the workman arrived at his place of work, and he held that this accident arose in the course of the man's employment. His Lordship arrived at a different conclusion. On the facts he thought that the master owed no such obligation to the workman. In his opinion the master was bound to obtain a licence for the man to go along the line so as to enable him to get to his work without being a trespasser, but he thought that was the whole of his duty. He was not under any obligation to the man to look after the running of the trains or to give any warning, or in any way take care of the man while crossing the line. As to the case which had been suggested of a man being injured in a factory while going to his work in another part of the same factory, if the whole factory was under the control of the employer, the suggested case did not assist the present case, for it was *idem per idem*. If, on the other hand, it was not under the control of the employer, the case was useless as an analogy unless it was also explained why the case of a factory not all under the control of the employer should be treated as analogous to the case of a factory which was all under the control of the employer.

LORD JUSTICE ROMER said he differed from his learned brethren with diffidence. The County Court Judge had found as a fact that this accident arose out of and in the course of the deceased man's employment. He thought that there was evidence to support this, and that they ought not to differ from the finding of the County Court Judge. The

place where the man's work had to be done was surrounded by railway lines and was difficult of access. He was bound to cross railway lines, and it was necessary for him to have a licence to cross them through the contractor. This licence was given by implication, and at the time of the accident the workman was acting under the licence. He thought the man's employment commenced when he began to act under the licence and cross the line. In his opinion the circumstances justified the finding of the County Court Judge that the man was acting in the course of his employment. He did not think he was bound to say that the man was not in the course of his employment until his work had actually begun. In his opinion this was like the case of a man who was employed in a particular part of a factory, and who had to go through the rest of the factory to get to his work. If, while so going to his work, he met with an accident, that would be in the course of his employment. It was said that that was different from this case, because the factory all belonged to the master. But this case seemed to him to be analogous, for the contractor had some power over the line to be crossed. This case did not seem to be analogous to the case of a workman who was injured while going along a public highway. In his opinion, therefore, the appeal ought to be dismissed.

Solicitors: *William Hurd & Son, agent for David & Evans, Cardiff, for the appellants; F. P. Jones-Lloyd, for the respondent.*

Also reported (1899) 2 Q. P. 319; 68 L. J. Q. B. 724; 80 L. T. 831.

## CHANDLER *v.* SMITH & SON.

Before A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.

(1899.) 15 *T. L. R.* 480.

*Disablement—The Work at which he was employed.*—SECT. 1, 2 (*a*); SCHED. I. 1, 2.

The work referred to in section 1, 2 (*a*) of the Act is the same and entire work on which the workman was engaged at the time of the accident.

If a workman earns after the accident the same amount of wages as he had previously earned, he is not at that time entitled to receive compensation. In such a case the workman is entitled to an award fixing the employer with liability, but the assessment of compensation may be adjourned until such time as the workman suffers loss through disability.

THIS was an appeal from an award of Judge Smyly, Q.C., sitting at the Derby County Court, under the Workmen's Compensation Act, 1897. The appellant, William Chandler, was a workman in the employment of the respondents, Thomas Smith & Son, carpet manufacturers, as foreman of the weaving department. He had general supervision of the weaving department, where about sixty girls and eight to ten men were employed. A fitter was employed to set up and adjust the weaving machines, but the appellant used frequently, to the knowledge of the respondents, to set up and adjust the machines, and cut the cards for and set up the work upon the Jacquard frames. Upon November 3, 1898, the appellant, while adjusting a machine, had his right thumb almost entirely severed by an accident arising out of and in the course of his employment. He was taken to the infirmary, where the thumb was amputated, and he returned to the factory the same day, but went home after the dinner hour and remained there. The following days he returned to his work and remained at the factory during working hours, except that from time to time, extending over four

weeks, he attended at the infirmary to have his hand dressed. These attendances occupied about an hour each. Since the accident the appellant was unable to set up or adjust the machines, or to cut the cards for and set up the work upon the Jacquard frames, and the respondents employed another man at this work, the appellant being employed solely in the supervision of the weaving department. The appellant's wages before the accident were £3 a week, and since the accident he continued to receive £3 a week, and the respondents said that they had no intention of parting with him. It was admitted for the purposes of the case that the appellant's wage-earning power as foreman in any factory where he might seek employment, should he leave the respondents' service, was materially decreased. The respondents contended that there was no evidence that the appellant had been disabled for a period of two weeks from "earning full wages" at the work at which he had been employed, within section 1, subsection 2 (*a*), of the Workmen's Compensation Act, 1897, and that the appellant was not entitled to compensation because he was earning and able to earn the same wages as before the accident. The County Court Judge found that the wages after the accident were paid, not as a matter of grace, but in performance of the contract of service; that the appellant had not been disabled for a period of two weeks from "earning full wages at the work at which he was employed;" and that, therefore, the Act did not apply. By section 1, subsection 2 (*a*), "the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed."

Mr. *Parfit* appeared for the appellant; and Mr. *Hextall*, for the respondents.

The COURT, having taken time to consider, delivered judgment allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment: The question is whether, when a workman by reason of an accident arising out of and in the course of his employment

has had his right thumb cut off and has thereby become a mutilated and injured man for life, he is prevented from obtaining compensation from his master under the Workmen's Compensation Act, 1897, by reason of subsection 2 (*a*) of section 1 of that Act, which subsection runs thus: "Provided that the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed." It was proved that the injured workman at the time of the accident was in the service of the respondent at a weekly wage of £3; that his duties consisted in part of adjusting machinery and in part of general supervision over the other *employées* of his master; that in the course of this employment he met with the injury complained of: that for the two weeks after the accident he continued to give supervision, but was unable by reason of the loss of his thumb to adjust machinery; that he was absent from his work for short periods in order to have his injury dressed at the hospital; and that his master nevertheless continued to pay him the weekly wage of £3. The difficulty in this case arises from the finding of the learned County Court Judge, who has found that the wages for the week of the accident and for the following weeks were paid, not as matters of grace, but in the performance of the contract of service, and that the applicant had not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed. The meaning of subsection 2 (*a*) of section 1 in my judgment is that, if the accident be of such a nature that the man is by law entitled during the two weeks immediately following the accident to recover full wages from his master at the work at which he was employed as before the accident, then such an accident is not to give rise to a claim by the workman against the master under the Act. The meaning of this subsection is well exemplified by the maxim "De minimis non curat lex." If the master out of feelings of compassion and generosity, as happily is often the case, continues to pay the full wage, though not under

legal obligation to do so, that does not bring the case within the subsection. We have ever held that a finding of fact of a County Court Judge binds us, and that it is only on a matter of law that there is an appeal. But if a learned County Court Judge decides a fact when there is no evidence upon which he could find it, this is a matter of law, for in such a case he has misdirected himself, and this is law. Now, where is the evidence that a man maimed and mutilated for life by the loss of his thumb is by law entitled to recover from his master the same wage as he could have recovered before he was so mutilated? And, indeed, the evidence in the present case is that the workman was disabled from performing part of the work for which he theretofore was entitled to receive £3 per week, and that he had also to absent himself from his work during portions of the time when he should otherwise have been working for his master to entitle him to earn the £3; and, moreover, the master had to employ another workman at an extra wage to do the work upon the machinery which the injured workman theretofore had to do. In my judgment there was no evidence that the workman could at law have exacted from his master the full wage to which he had been entitled before the accident, and, indeed, he could not have done so, and, consequently, there is no evidence that the payment of the full wage was not an act of grace of the master as found by the learned Judge. For these reasons I am of opinion that the appeal of the workman must be allowed with costs here and below, and I think that the case must go down to the learned County Court Judge to assess the amount of compensation to which the applicant is entitled; but, as my brethren think that the assessment of compensation should be postponed as mentioned by them, I will not disagree with them as to this.

Lord Justice Rigby read the following judgment: The only question arising on this appeal is whether the County Court Judge was right in holding this to be a case to which the Workmen's Compensation Act, 1897, does not apply, on the ground that the applicant was not disabled for a period

of at least two weeks from earning full wages at the work at which he was employed. William Chandler, the applicant, had been for many years in the employ of Thomas Smith and Son as foreman of the weaving department. The terms on which he was employed are not in dispute. He had to mount or set up every machine in his department, and if anything went wrong he had to adjust it, if the single fitter employed could not make the machine right. He also had to cut and put into the Jacquard machines all the pattern cards, and had the general supervision of the weavers. For all this work he received wages at £3 a week. On November 3, 1898, whilst adjusting a machine that was out of order, being, as is admitted, work for which he was employed, he had his thumb lacerated and torn, so that it had to be amputated, and it is admitted that he is now unable to set up or adjust a machine, or so quickly to cut the cards for and set up work on a Jacquard frame; that, consequently, his wage-earning power as such foreman, as aforesaid in any factory where he might seek employment, should he leave the respondents' service, is materially decreased. He is, however, and from the date of the accident, with the exception of short absences for the necessary purpose of attending at the infirmary to have his wound dressed, always has been as capable of doing the work of superintending the weavers as he was before. Since the day of the accident the applicant has received for each and every week the amount of his full wages—namely, £3 a week. The respondent states that he has no intention of parting with the applicant, but he has had to employ an additional fitter to adjust the machines, and, when work requires to be set up on a Jacquard frame a certain weaver is taken from other work for the purpose. In this state of things the learned County Court Judge has found that the wages for the week of the accident and for the following weeks were paid, not as matters of grace, but in performance of the contract of service. If this means that the employer was bound by the contract to go on paying him his full wages until notice was given determining the contract, it

may be true, subject to the right to a deduction for any time during which he was absent from work—a deduction which the County Court Judge has fixed at 10*s.* for the first week and at 7*s.* for each of the following three weeks; but, however this may be, I cannot agree with the learned Judge that the applicant has not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed at the time of the accident. Ever since the date of the accident he has been absolutely disabled from doing a substantial part of the work which at the time of the accident he was employed to do, and the disability seems likely to be permanent. Clearly the employers were under no legal—whatever may have been the moral—obligation to retain him in their service at full wages under the altered circumstances. In my judgment the disability referred to in sect. 1, subsect. 2, cannot depend upon the greater or smaller liberality of the employer; it must be a physical disability, and must depend upon the question whether the workman is capable of performing the work at which he was employed at the time of the accident as efficiently as he did before. In a case like the present, where a substantial part of the work cannot be done at all, the exception introduced by the section does not apply at all. I concur in the judgment about to be delivered by Lord Justice Vaughan Williams as to the course that ought to be pursued.

Lord Justice Vaughan Williams read a judgment in which he said that he agreed in the result. The fact that the workman had been paid full wages as before the accident did not conclusively show that he had not been disabled from earning full wages at the work at which he was employed, because part of the wages might have been paid to him as an act of grace. The County Court Judge had, however, found as a fact that the wages received by the workman since the accident were paid, not as a matter of grace, but in performance of the contract of service. The contract in the present case was a contract by the week, and the fact that the master chose to re-engage the workman at the end of each week at

the old wages was some evidence that the master considered the workman worth that wage, notwithstanding the loss of his thumb; and that was a very different thing from the master refraining from making a deduction from the wages of a workman employed under a continuous contract for a year, or other period exceeding two weeks. The Court were bound by the findings of the County Court Judge, if there was any evidence to support them, and it seemed difficult to say that the re-engagement at the end of each week was not some evidence that the master considered the workman to be worth the full wage of £3 a week. Assuming that this difficulty of the finding of the County Court Judge was got over, there still remained the difficulty that the Judge by his judgment ordered that the applicant should recover nothing from the respondents as compensation. The measure of compensation allowed by the Act would give the workman nothing, unless it could be truly said that there was a difference between the amount of the average weekly earnings of the workman before the accident and the amount which he was able to earn after the accident. He could not see, therefore, that the judgment of the County Court Judge was wrong, as far as it went in awarding nothing to the applicant, but as the question of liability as well as the question of the amount or duration of compensation was to be settled by arbitration, it seemed to his Lordship that the Judge should have made a declaration of liability and adjourned the question of the amount and duration of compensation. This seemed to be in accordance with the spirit of schedule I. para. 12. If the award might be reviewed when the facts had been ascertained, it seemed only reasonable that the fixing of the amount of compensation might be postponed until the facts were ascertained to which the measure was to be applied, and his Lordship preferred this course to that of awarding a weekly payment of one penny, and then applying the provisions of paragraph 12 of schedule I.

For the respondent, *Irons* v. *Davis & Timmins* (*post*, p. 26) was cited.
Also reported in (1899) 2 Q. B. 506; 68 L. J. Q. B. 909.

A memorandum of such an award must be sent to the Registrar of the County Court under sched. II. para. 8. The reason for adjourning the assessment of compensation is that an award that does not provide for the payment of compensation cannot be reviewed under sched. I. para. 12. An adjournment will not be necessary if the respondent consents to an award for a nominal sum, say one penny a week, as was done in *Iron* v. *Davis & Timmins* (below).

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## IRONS *v.* DAVIS & TIMMINS (LIMITED).

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

*The Times, May* 15, 1899.

*Compensation, Measure of—Pain and Suffering.*—SECT. 1, 2 (*a*); SCHED. I. 1 *and* 2.

The Act does not give compensation in respect of pain and suffering. When a workman is in receipt of the same amount of wages as he earned before the accident, he cannot recover any compensation until such time as he may become incapable of earning that amount.

THIS was an appeal from an award of the Judge of the Clerkenwell County Court under the Workmen's Compensation Act, 1897. The respondent Irons, who was 17 years of age, was injured by an accident while in the employment of the appellants, the thumb of one of his hands being injured so that it had to be amputated at the top joint. The respondent was absent on account of the accident for eight weeks. His wages before the accident were 9*s.* a week. At the end of the eight weeks he came back to the employment of the appellants and received 9*s.* a week as wages, but he was not employed at the same work as before. The County Court Judge awarded the respondent 27*s.* for the period during which he was absent from work, excluding the first two weeks, and awarded him 2*s.* 6*d.* a week for life. At the time of the award the respondent had gone back to his employment. The question was whether there was any evidence

upon which the Judge could award a weekly payment during the period subsequent to the respondent resuming work at the old rate of wages. No question arose as to the award of 27*s*.

Mr. *A. T. Lawrence*, Q.C., and Mr. *Rowlatt*, for the appellants, contended that under schedule I. para. 21, of the Workmen's Compensation Act, 1897, inasmuch as the respondent came back to work at the same rate of wages as before, the Judge could award no compensation except for the period during which the respondent was absent from his work.

Mr. *Ruegg*, Q.C., and Mr. *E. Browne*, for the respondent, contended that the words "total or partial incapacity for work" in schedule I. para. 2, meant incapacity for the class of work at which the workman was employed before the accident, and the words "able to earn" in the same paragraph meant able to earn wages at the same class of work. Though the respondent received the same rate of wages after the accident as before, he was not such a good wage-earning machine as he was before the accident. He was not put back to do the same work as before, but was put to do odd jobs. If the Court held that he could not be awarded any weekly payment then, if he left the appellants' employment and could not earn so high wages in another employment as he could if his thumb were not taken off, para. 12 of schedule I. would not enable the Judge to award him anything, as by that paragraph a weekly payment could, on review, only be "ended, disminished, or increased."

LORD JUSTICE A. L. SMITH: Do you object, Mr. Lawrence, to our awarding the respondent a nominal sum per week, so that he may not be debarred from applying to the Judge under para. 12 to review the weekly payment if circumstances should arise which require it?

Mr. *Lawrence:* No, my Lord; we have no objection.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that no question arose as to the 27*s*. awarded. But the Judge went further, and

awarded 2*s.* 6*d.* a week for life. In his opinion there was no evidence to justify his awarding that or any other sum. The evidence showed that the respondent earned the same wages after the accident as before. The appellants, however, had consented, in order to bring the case within para. 12 of schedule I. that a nominal sum should be awarded, and therefore the award would be one penny a week.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Also reported in (1899) 2 Q. B. 330; 68 L. J. Q. B. 673; 80 L. T. 673.

In this case the respondent consented to an award for a nominal payment of a penny a week. That would enable the reward to be reviewed under schedule I. 12. It is a different method for procuring the same result as in *Chandler* v. *Smith* (*ante*, p. 19); viz. the provision for the future assessment of compensation which the workman at the date of the arbitration is not entitled to. The subsequent inquiry would be precisely the same; the one being a review of the amount of the payment awarded by consent, and the other the adjourned hearing of the original arbitration. A memorandum of the award must in each case be registered, and it does not seem to matter which course be adopted.

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## RUMBOLL *v.* NUNNERY COLLIERY COMPANY (LIMITED).

Before A. L. SMITH, CHITTY, and COLLINS, L.JJ.

*The Times, February* 6, 1899.

*Serious and Wilful Misconduct—Breach of Statutory Rules.*—SECT. 1, 2 (*c*).

A breach by workmen of the rules of a coal-mine which are authorized by Statute does not necessarily involve serious and wilful misconduct, which is a question of fact to be determined by the arbitrator.

THIS was an appeal by the Nunnery Colliery Company from the decision of the Deputy Judge of the Sheffield County Court (Mr. Cyril Dodd, Q.C.). The respondent, Henry

Rumboll, was a miner in the employment of the appellants, the Nunnery Colliery Company, at their colliery, his wages being 32*s.* per week. Upon July 15, 1898, the respondent was at work with other men in the mine getting coal, and at the beginning of the shift they were trying to get rid of a stone from the roof of the place where they were working. The deputy came up at the time, and instructed them to put up a bar across the roof supported by two props, one on each side of the working place, in order to prevent the stone from falling down. This was accordingly done, but a few hours later the plaintiff and another man took down the bar and props, because, as they said, the corves or trucks with the coal in them could not get by, and also because the getting of the coal was rendered more difficult by reason of the props standing against the walls of the working place. Instead thereof they put up a prop directly under the stone to support it. About two hours after this was done the stone fell from the roof upon the respondent and so injured his leg that it had to be amputated. Upon an application for compensation under the Workmen's Compensation Act, 1897, the appellants contended that the respondent had been guilty of "serious and wilful misconduct" within section 1, subsection 2 of the Act, by disobeying the express orders of the deputy, and could not therefore recover compensation. That subsection provides that "if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed." Section 49 of the Coal Mines Regulation Act, 1887, prescribes general rules to be observed in coal-mines. Rule 4 says that a competent person shall before the commencement of each shift inspect every part of the mine beyond the station and in which workmen are to work or pass during the shift, and that no workman shall pass beyond the station until the part of the mine beyond the station has been so examined and stated by such competent person to be safe. Rule 7 provides for the withdrawal of workmen from any part of a mine which is found to be dangerous. Rule 21 is as

follows: "The roofs and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working place which is not made so secure." Section 50 of the Act provides that every person who contravenes or does not comply with any of the general rules shall be guilty of an offence against the Act. By section 60, where a person is guilty of an offence against the Act which was reasonably calculated to endanger the safety of the persons employed in the mine, and was committed wilfully, such person shall be liable to imprisonment. Rule 100 of the special rules established in the appellants' mine, under section 51 of the Coal Mines Regulation Act, provided as follows: "The miners must build good pack walls, and set a sufficient quantity of props and bars for safely securing the roof and sides of their working-places, and add to them or renew them when necessary, or when told by the manager, under-manager, or deputy." By rule 106 of the special rules, "All persons employed in the mine shall be under the control of the manager, under-manager, and deputies, and shall at all times obey their lawful commands." By rule 107, "Any person committing a breach of any of the foregoing special rules is guilty of an offence against the Act." The learned County Court Judge came to the conclusion that the respondent had not been guilty of serious and wilful misconduct, and awarded him 16*s.* a week from August 1 to November 1, 1898; 14*s.* a week from November 1 to January 1, 1899; and 7*s.* a week afterwards.

Mr. *Ruegg*, Q.C., and Mr. *T. E. Ellison* appeared in support of the appeal, and argued that, having regard to the general and special rules, there was no evidence that the respondent's injury was caused otherwise than by his own serious and wilful misconduct.

Mr. *Etherington Smith*, for the respondent, argued that the question was one of fact, and not of law, and that a breach of colliery rules did not necessarily constitute serious and wilful misconduct. The respondent and his fellow-

workman, in taking down the props which had been put up at first and substituting for them another, were acting in furtherance of the work which they had to do. It must be taken that they had a reasonable discretion as to the manner in which they should do their work.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said he would repeat what he had stated on former occasions—namely, that in appeals under the Workmen's Compensation Act the duty of this Court was limited to the consideration of questions of law. Where it was desired to dispute a finding of the County Court Judge on a question of fact, it was necessary to satisfy the Court that there was no evidence on which the County Court Judge could rightly have found as he had found. This was a claim made by a workman in a mine. *Prima facie*, where a workman in an employment which came within the purview of the Workmen's Compensation Act met with an accidental injury, his master was liable to pay him compensation, although there had been no negligence on the master's part; but one exception to that liability—he did not say there were not other exceptions—but one exception was where the injury was attributable to the serious and wilful misconduct of the workman. In his judgment it was not right to say that every violation by a workman of any of the rules, general or special, framed for the regulation of coal-mines must necessarily render the man guilty of serious and wilful misconduct within the meaning of the Workmen's Compensation Act. Such a proposition could not be laid down as a matter of law, but it was necessary in each case to consider the particular circumstances. He would take it that some of the rules to which they had been referred had been broken in this case, but when all the circumstances were considered, he could not say that the evidence was such that, as a matter of law, the County Court Judge was bound to hold that this workman was guilty of serious and wilful misconduct. He therefore thought that the appeal must be dismissed.

LORDS JUSTICES CHITTY and COLLINS delivered judgment to the same effect.

The Appellants cited *Lewis* v. *G. W. Ry.*, 3 Q. B. D. 195; *Wales* v. *Thomas*, 16 Q. B. D. 340; *Gibbon* v. *Phillips*, 64 L. J. M. C. 42.

Also reported in 80 L. T. 42; 63 J. P. 132. Compare *Lowe* v. *Pearson* (*ante*, p. 5); *Rees* v. *Thomas* (*ante*, p. 9); *Burrell* v. *Avis* (*post*, p. 129).

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## EDWARDS *v.* GODFREY.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 365.

*Action for Damages—Arbitration for Compensation.*—SECT. 1, 4.

An unsuccessful plaintiff in an action cannot subsequently proceed for compensation by arbitration.

THIS was an appeal from an award of the Wandsworth County Court Judge upon proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Edwards, was in the employment of the appellant, Godfrey. The respondent was employed on a building over 30 feet in height, upon the top storey of which a studio was being erected. A scaffolding was used in carrying out the work. The respondent was employed in glazing the studio, and on September 12, 1898, he was descending from the outside of the studio when he fell to the ground and was injured. The respondents brought an action against the appellant in the Wandsworth County Court under the Employers' Liability Act, 1880, and this action was tried on January 9, 1899, before a jury, when the jury found that the respondent was guilty of contributory negligence, and judgment was given for the appellant. No application was then made on behalf of the respondent to assess compensation under the Workmen's Compensation Act, 1897. On January

30, 1899, the respondent took proceedings to recover compensation under the Act of 1897, and on March 13 the County Court Judge made an award in his favour and assessed the compensation at 11*s.* a week.

Mr. *Frank Gover*, for the appellant, contended that by section 1, subsection 2 (*b*) and subsection 4, of the Workmen's Compensation Act, 1897, the workman could claim compensation either under the Employers' Liability Act, 1880, or under the Act of 1897. He could not take two independent proceedings. By section 1, subsection 4, of the Act of 1897, if an action was brought to recover damages independently of that Act, and the action was dismissed, the Court might, if the plaintiff chose, proceed to assess compensation under the Act of 1897, and might deduct from such compensation the costs caused by the plaintiff having brought the action under the Employers' Liability Act, 1880. That was in favour of the workman, and if he did not apply for compensation to be then assessed under the Act of 1897, he could not subsequently take proceedings under that Act. If he could take subsequent proceedings, then the employer would be deprived of the advantage of having the costs to which he was put by reason of the plaintiff having wrongly sued him under the Act of 1880 deducted from the compensation.

Mr. *Colam*, for the respondent, contended that the dominant idea of section 1, subsection 2 (*b*), of the Act of 1897 was to prevent the ordinary right of the workman being taken away, and the latter part of the clause prevented the employer being liable twice over. But neither that subsection nor subsection 4 said that no proceedings should be taken under the Act of 1897 if the action at common law or under the Employers' Liability Act, 1880, failed. Section 1, subsection 2 (*b*), said that the employer should not be liable to pay compensation twice over, but it did not do away with the double remedy. That subsection only applied to cases where the injury was caused by the personal negligence or wilful default of the employer or of some person for whom

the employer was responsible. The County Court Judge was therefore right.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the workman failed to recover judgment under the Employers' Liability Act, 1880, and in ordinary circumstances that would be an end of the case as between the employer and the workman, and the employer in any subsequent proceedings by the workman for the same cause of action could plead *res judicata*. That finished the action under the Act of 1880. Subsequently the workman took proceedings and obtained an award under the Workmen's Compensation Act, 1897. The question was whether the workman, after having exercised his option of suing under the Act of 1880, could revert back to the Act of 1897. In his opinion section 1, subsection 2 (*b*), of the Act of 1897 gave the workman, in the circumstances there mentioned, the option of claiming compensation independently of the Act or under the Act. The workman here exercised his option of claiming independently of the Act. If it had not been for section 1, subsection 4, of the Act the matter would then have been *res judicata*. But that subsection gave the workman the advantage, when he had wrongly exercised his option of proceeding independently of the Act and had failed, of having compensation then and there assessed under the Act of 1897 by the Court which had seisin of the case. There was that *locus penitentiæ* given to the workman. At the same time a benefit was given to the employer by allowing the Judge to deduct from the compensation awarded the costs caused by the workman having wrongly brought the action. If this were not the true construction of the Act, a workman who had failed in an action under the Employers' Liability Act, 1880, would never apply under section 1, subsection 4, of the Act of 1897 for compensation under that Act, but would always take fresh proceedings under the Act of 1897, in which case the Judge could not deduct the costs of the former action from the compensation awarded.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Solicitors: *E. J. H. Carter, for the appellant: G. Aplin Nichols, for the respondent.*

Also reported in (1899) 2 Q. B. 333; 68 L. J. Q. B. 666; 80 L. T. 672.

Sect. 1, 4 provides that the Court "shall, if the plaintiff shall so choose, proceed to assess such compensation." The effect of this decision is that the plaintiff has a choice of having the compensation assessed by the Court or going without.

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## SKEGGS *v.* KEEN.

Before A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.

*The Times, June* 19, 1899.

*Costs of Unsuccessful Action—Costs of Assessment of Compensation.*—SECT. 1, 4.

Where all the costs, with one immaterial exception, have been caused by the plaintiff having brought an unsuccessful action, it is right that he should not receive any costs in respect of the assessment of compensation under Sect. 1, 4.

*Quære* whether there is power to give an unsuccessful plaintiff any costs under that subsection.

THIS was an appeal from an award of Judge Addison, Q.C., sitting at the Southwark County Court, under the Workmen's Compensation Act, 1897. The appellant, Alfred Skeggs, was in the employment of the respondents, A. and P. Keen, and was injured by falling off a ladder while in the course of his employment. The appellant brought an action against the respondents under the Employers' Liability Act, 1880, in the Southwark County Court, alleging that the ladder was defective. The action was tried on December 13, 1898, and the jury found that the ladder was not defective, and returned a verdict for the respondents, and the action was dismissed with costs. At the request of the appellant

the Judge thereupon proceeded to assess compensation under section 1, subsection 4, of the Workmen's Compensation Act, 1897. That section provides that "if . . . an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such Act, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act." The Judge assessed the compensation, at the request of both parties, at a lump sum instead of a weekly payment, and he awarded the appellant £23 4*s*. No application was then made by the appellant for costs, but the appellant's solicitor carried in a bill of costs. There were applications made in respect both of this bill of costs and of the respondents' bill of costs in the action (which it is unnecessary, in view of the decision of the Court, to set out), and on April 10, 1899, the Judge, after stating that the respondents were willing to, and did, admit their liability under the Workmen's Compensation Act, 1897, but refused to make an offer under the Employers' Liability Act, 1880, as they considered that the appellant had no case under that Act, but the action was brought instead, said that he found as a fact that all the costs (with one immaterial exception) which the respondents had incurred had been occasioned by the appellant bringing the action under the Act of 1880. He also decided—though his finding of fact as above rendered it unnecessary to decide this point—that there was no jurisdiction to give the appellant any costs.

Mr. *Cyril Dodd*, Q.C., and Mr. *Moyses*, for the appellant, contended (*inter alia*) that when the Judge proceeded to assess compensation under section 1, subsection 4, of the

Workmen's Compensation Act, 1897, after the action was dismissed, he had jurisdiction to allow the workman the costs in respect of the assessment of the compensation.

Mr. *Lawson Walton*, Q.C., and Mr. *Ellis Hill*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, according to the finding of the County Court Judge, the employers were willing to compensate the workman under the Act of 1897, but the workman persisted in going on under the Employers' Liability Act, 1880. He was defeated. He then asked the Judge to assess compensation under the Act of 1897, and the Judge did so. The appellant said that he was entitled to his costs of assessing compensation under the Act of 1897. It was unnecessary to decide the point of law raised, because it was clear that, considering how the appellant persisted in going on with his claim under the Act of 1880, the learned Judge made a perfectly right order.

LORD JUSTICE RIGBY concurred. Though it was not necessary to decide the question of law, and though he did not wish to prejudice any other case in which the question might arise, the inclination of his opinion was that where compensation was assessed under section 1, subsection 4, of the Act of 1897, the workman was not entitled to any costs. That subsection did not seem to him to give the workman any such right to costs as he would have had if there had been proceedings to assess compensation under the Act. The only proceeding in the case was the action under the Act of 1880, which action failed. The subsection gave the Judge power, in dismissing the action, to assess compensation under the Act of 1897, but it did not say that the workman was to have any costs in addition to the compensation. However, it was not necessary to decide the point.

LORD JUSTICE VAUGHAN WILLIAMS agreed. They were not deciding whether, where an application was made under section 1, subsection 4, of the Act to assess compensation after the workman had failed in his action under the

Employers' Liability Act, 1880, the Judge had or had not jurisdiction to give the workman any costs in respect of getting the compensation assessed. It was not necessary to determine that question, and he would say nothing about it. He understood from the learned Judge's notes that all the costs were incurred in the action, and not one penny of costs was attributable to the assessment of compensation under the Act of 1897.

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## LANCASHIRE INSURANCE COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Before WILLS and BRUCE, JJ.

(DIVISIONAL COURT.)

(1898.) 15 *T. L. R.* 119.

*Insurance Policy—Stamp Duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sect.* 98, *Schedule I.*

A policy of insurance requires a 10*s.* stamp if it be under seal, otherwise a 6*d.* stamp.

THIS was an appeal from the decision of the Commissioners as to the stamp to be affixed to a document professing to be a policy of insurance in respect of compensation to be paid by an employer to a workman injured in his service.

Mr. *Cohen*, Q.C., and Mr. *F. L. Wright* appeared for the appellants; the Solicitor-General (Sir *R. Finlay*, Q.C.), with Mr. *Danckwerts*, appeared for the Crown.

On September 8, 1898, an instrument was presented on behalf of the Lancashire Insurance Company by their solicitors to the Commissioners of Inland Revenue, under the provisions of the 12th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39), for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The following is a copy of the instrument in question. It was an instrument under seal:—

"Employers' Liability Policy. First premium to August 9, 1899, 9*s.* 6*d.* Employers' insurance policy against the full liability under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897, and also against the liability at common law. Estimated amount of wages, etc., on which the undermentioned sum paid in respect of premium has been calculated, £127 8*s.* Sum paid in respect of premium, 9*s.* 6*d.* Whereas Messrs. Wren, Rogers, and Company, of Smithfield-street, Birmingham, carrying on the business of iron and metal merchants, . . . have paid the Lancashire Insurance Company the sum mentioned above in respect of premium, and have delivered to the company a proposal in writing for an indemnity against claims for compensation for personal injury sustained by workmen. Now these presents witness and it is agreed as follows: The company shall pay for and on behalf of the employer such sums as the employer shall become liable to pay under or by virtue of the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or under or by virtue of the common law, in respect of personal injury caused in the above-mentioned business during the continuance of this policy to any workmen in the employ of the employer or of any sub-contractor for injury to whose workmen he may be answerable. The employer shall give immediate notice to the company of any accident causing injury to a workman, and shall forward to the company every written notice or information as to every verbal notice of claim within three days after the receipt of such notice, and shall also give all information and assistance required to enable the company to settle or resist any claims as they may think fit."

The Commissioners, being of opinion that the instrument was not a "policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury," held that the instrument was not a "policy of insurance against accident" as defined in section 98 (1) of the Stamp Act, 1891, and was not chargeable

by reference to the head of charge, "Policy of insurance against accident and policy of insurance for any payment agreed to be made during the sickness of any person, or his incapacity from personal injury," in the first schedule to the said Act. They consequently held that it was liable to the duty of 10*s.* as a deed.

Mr. *Cohen* said if a policy of indemnity under the Employers' Liability Act, 1880, was an insurance, this was an insurance. Since 1880 such insurances had only been stamped with a penny stamp. A new light would seem to have burst upon the authorities. He referred to section 98 of the Stamp Act, 1891, defining life policies, and cited *Colquhoun* v. *Brooks* (21 Q. B. D. 52). The section was not confined to the case where the injury happened to the assured. By the letter of the enactment it was an insurance against accident. It was an agreement to pay money on the death of a workman or when he was injured.

The *Solicitor-General* and Mr. *Danckwerts*, for the Crown, argued that this was not a policy within the Stamp Act. The subject of the policy was legal liability, not accident. It did not follow that when an accident happened the employer was liable. There was something more to be proved —namely, his liability.

The COURT, being told that the next case raised the same point, determined to hear the arguments before giving judgment. It was accordingly called on.

Solicitors: *Bower, Cotton, & Bower, for Janion & Hall; The Solicitor for Inland Revenue, for the Crown.*

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## VULCAN BOILER, &c., CO. *v.* COMMISSIONERS OF INLAND REVENUE.

THIS case was a similar one to the above, but the question was whether a penny stamp or sixpenny stamp was required, the policy not being under seal.

Mr. *Jelf*, Q.C., and Mr. *J. E. Bankes* appeared for the appellants; The Solicitor-General and Mr. *Danckwerts* appeared for the Crown.

Similar arguments were advanced to those in the last case.

Mr. JUSTICE BRUCE delivered the following written judgment in favour of the Crown: In these two cases the instruments are chargeable respectively with stamp duty, in the one case as a deed, in the other case as an agreement, unless the instruments fall within the description of "policy of insurance against accident" given in section 98 of the Stamp Act, 1891. "Policy of insurance against accident" means, according to the section, a policy for any payment to be made upon the death of any person otherwise than from a natural cause or as compensation for personal injury. In substance I think there is no distinction to be drawn between the two policies in point of form. But I will take the policy in the case of the Lancashire Insurance Company, the form of which is certainly quite as favourable to the appellants as the other policy. The proposal which is declared in the recital at the commencement of the policy to form the basis of the contract is described as a proposal for an indemnity against claims for compensation for personal injury sustained by workmen. The operative part of the policy binds the assurer "to pay for and on behalf of the employer such sums as the employer shall become liable to pay under or by virtue of the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or under or by virtue of the common law in respect of personal injury caused in the business carried on by the assured in their business of metal merchants to any workmen in the employ of the assured or of any sub-contractor for injury to whose workmen the assured may be liable. It is quite clear upon the wording of the policy that the payment agreed to be made depends upon the liability of the assured to answer for the death of his workmen or for the personal injury sustained by his workmen. The death of a workman in the employ of the

assured might be caused by other than natural causes, or such workman might sustain personal injury, and yet no payment would become due under the policy unless the death were caused or the personal injury were caused in such circumstances as to render the assured liable to pay compensation. The payment, therefore, is not, I think, a payment agreed to be made upon the death of a person otherwise than from a natural cause, or as compensation for personal injury, but is a payment agreed to be made as an indemnity against claims for compensation for which the assured is answerable. Two things must happen. There must, first, be the death or personal injury of a workman; and, secondly, there must be a liability on the part of the assured to make compensation for the death or personal injury. It was argued by Mr. Cohen in the one case and by Mr. Jelf in the other that, although the two conditions must exist before the policy could become operative, yet the payment stipulated for by the policy was not the less a payment to be made upon death or as compensation for personal injury merely because some other condition than death or personal injury must exist before the policy could be enforced. They instanced the case of life policies and accident policies which commonly contain various stipulations requiring certain notices to be given within a stipulated time of the happening of the death or accident the strict observance of which is made a condition precedent to the right of action on the policy, and they contended that such policies did not cease to be life policies or accident policies by reason of the right of action on the policies depending upon some event other than the death or accident. But the answer to that argument is, I think, this—that the conditions in such cases are incidental to the subject-matter of the insurance. The governing event in those cases is the death or accident, and the ordinary stipulations to which reference was made by the learned counsel are stipulations made with a view to fence and protect the rights of the assurer so as to enable him to require satisfactory evidence of or to make due inquiry concerning

the facts upon which his liability depends. They do not alter the character of the risk upon which the assurance depends. Such conditions grow out of and are subsidiary to the subject-matter of the insurance. But it seems to me in the present case that the liability of the assured to compensate his workmen lies at the very root of the contract; it is the cardinal event upon which the liability of the assurer to pay the money under the policy depends. It is in truth and substance a contract of indemnity, and, although the indemnity is against liability arising from death or personal injury and the death or personal injury is a *sine qua non*, and the death or personal injury is one of the conditions of the liability of the assured, yet it is not the condition upon which the liability of the assurer depends; it is not the condition upon which, by the terms of the instrument, the payment agreed to be made depends.

MR. JUSTICE WILLS added that even if the instrument fell within the first part of the definition of policy against accidents, there would still remain another part of the policy which would not come within the rest of the definition. The liability of the employer to pay could not by any reasonable stretch of words come within the definition. The appeal must be dismissed.

In support of the argument that Taxing Acts should be construed strictly, *Oriental Bank Corporation* v. *Wright*, 5 A. C. 842 at 856, was cited, and that such a policy was not a contract of indemnity, *Dalby* v. *East India Insurance Co.*, 15 C. B. 365; *Theobald* v. *Railway Passengers Insurance Co.*, 10 Exch. 45; *Bradburn* v. *Great Western Railway*, L. R. 10 Ex. 1; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560.

Also reported in (1899) 1 Q. B. 353; 68 L. J. Q. B. 143; 79 L. T. 731; 47 W. R. 396; 63 J. P. 21.

## POWELL *v.* BROWN AND ANOTHER.

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

(1898.) 15 *T. L. R.* 65.

*On, or in, or about.*—SECT. 7, 1.

**Employment on a van standing in the road and being loaded with goods from a factory is about the factory.**

THIS was an appeal by the defendants from the decision of Judge Collier, sitting at the Liverpool County Court, on proceedings taken under the Workmen's Compensation Act, 1897. The defendants, Messrs. Brown and Backhouse, were builders and contractors occupying premises in Chatham-street, Liverpool. William Powell, the man in respect of whose death the proceedings were taken, was in the employment of defendants as a carter. On the day in question a cart belonging to the defendants was standing in the street near to the entrance of the defendants' premises, upon which certain timber taken from their premises had been placed. It was Powell's duty to arrange the timber in the cart. He was standing on the timber in the cart and was waiting for some bolts to complete the load, when by some accident a piece of timber tilted and threw him on to the road, and he received injuries from which he died. The County Court Judge held the defendants' premises to be a factory within the meaning of the Act; and he held that the accident arose out of and in the course of the deceased's employment, and that that employment was employment on or in or about a factory. He accordingly awarded the sum of £243 12*s.* 7*d.* to the widow of the deceased, by whom the proceedings were taken. The defendants appealed, and contended that the deceased's employment was not employment "on or in or about a factory" within the meaning of section 7, subsection 1, of the Workmen's Compensation Act. The deceased was

employed as a carter, and was at the time of the accident in charge of a cart which was outside the defendants' factory. His employment was clearly not on or in the factory. Neither, according to the true construction of the section, was it about the factory. The word "about" ought not to be limited as being simply equivalent to "near." It meant near and in the business of the factory.

Mr. *Joseph Walton*, Q.C., and Mr. *A. Aspinall Tobin* appeared for the defendants; Mr. *Ruegg*, Q.C., and Mr. *H. Thomas*, for the plaintiff.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said he thought the judgment of the County Court Judge was correct. The defendants kept a factory, and it was their practice to load their goods on carts in the street immediately outside their factory. The deceased was a carter in their employment, and at the time of the accident he was engaged in stowing timber in one of their carts at the place in question. In his opinion the stowing of timber in the carts was part of the factory business. He thought the deceased was employed "on or in or about the factory." The Legislature obviously thought that the word "on" would not include all that they intended to include, neither was the word "in" sufficient; they therefore added the word "about," which was clearly an enlarging word. The question was really a question of fact, and the County Court Judge had found that the employment of the deceased was on or in or about a factory. The appeal must therefore be dismissed.

LORDS JUSTICES RIGBY and COLLINS delivered judgment to the like effect.

Also reported in (1899) 1 Q. B. 157; 68 L. J. Q. B. 151 : 69 L. T. 631; 47 W. R. 145.

The court cited with approval from "Accidents to Workmen": "The word 'about' following 'on or in' would appear to signify locality—adjacent to the railway or factory."

Compare *Flowers* v. *Chambers* (*post*, p. 51). See note to *Woodham* v. *Atlantic Transport Company* (*post*, p. 56); *Lowth* v. *Ibbotson* (*post*, p. 46); *Chambers* v. *Whitehaven Harbour Commissioners* (*post*, p. 47).

## LOWTH *v.* IBBOTSON.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 264.

*On, or in, or about.*—SECT. 7, 1.

A carter delivering goods 1½ miles away from the place of employment is not about that place. The word "about" signifies propinquity. Whether employment is "on, or in, or about" a factory, etc., is a question of fact for the arbitrator.

THIS was an appeal from the decision of the Judge of the Sheffield County Court. The facts admitted and proved were that on October 13, 1898, the applicant sustained personal injuries in the course of his employment as carter for the respondents, who were millers at Sheffield. The accident happened a mile and a half from the respondents' factory, whilst the applicant was delivering sacks of flour taken from the respondents' factory on their dray. The County Court Judge held that the employment was not on, in, or about a factory at the time of the accident within the meaning of section 7 of the Workmen's Compensation Act, and he adjudged that the applicant was not entitled to compensation. The applicant appealed.

Mr. *Arthur Sims* appeared for the appellant; Mr. *Ruegg*, Q.C., and Mr. *Arthur Powell*, for the respondents.

The COURT, without calling upon counsel for the respondents, dismissed the appeal.

LORD JUSTICE A. L. SMITH said this was a plain case. The Workmen's Compensation Act had its limitations, though it conferred enormous benefit on *employés* at the expense of their masters. Section 7 said the Act should apply only to employment on, in, or about a railway, factory, etc. Here the employment at the time of the

accident was a mile and a half from the factory. Was that "about" the factory? He adhered to what he had said in *Powell* v. *Brown* (*ante*, p. 44), that the word "about" meant that the employment might be in close propinquity to the factory, and whether that was so in any particular case was a question of fact to be determined by the tribunal before which the claim came. The learned County Court Judge here found that what happened a mile and a half from the factory did not happen about the factory. He thought the learned Judge was right.

LORDS JUSTICES COLLINS and ROMER concurred.

Solicitors: *Halses, Trustram, & Co., for A. Muir Wilson, Sheffield, for the appellant; W. Hurd & Son, for A. Neal, Sheffield, for the respondents.*

Also reported in (1899) 1 Q. B. 1003; 68 L. J. Q. B. 465; 80 L. T. 341; 47 W. R. 506. See *Chambers* v. *Whitehaven Harbour Commissioners* (*infra*); *Powell v. Brown* (*ante*, p. 44).

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## CHAMBERS *v.* WHITEHAVEN HARBOUR COMMISSIONERS.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 341.

*On, or in, or about—Engineering Work.*—SECT. 7, 1 *and* 2.

Employment on a hopper which is discharging 1½ miles out at sea mud which has been taken from a harbour by the workman using a steam-dredger, is not employment on, in, or about an engineering work.

THIS was an appeal from an award of the Judge of the Whitehaven County Court upon proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant, Ann Chambers, was a dependant of a workman who was killed while in the employment of the respondents,

the Whitehaven Harbour Commissioners. The respondents owned a steam-dredger which was used for dredging the harbour. A captain, an engineer, and six labourers, including the deceased man, all in the employment of the respondents, were employed on the dredger. The respondents also owned some hoppers or barges into which the spoil which was dredged up was emptied, and the hoppers when filled were towed about a mile and a half out to sea, and the spoil emptied out. Two of the labourers who were employed on the dredger went out in turn with the hoppers to sea. Upon the day in question the deceased went with another man out in a hopper with a load of spoil to sea, and when the hopper got a mile and a half out, the deceased, who was standing on two planks across the well of the hopper, knocked out the bolts which fastened the doors at the bottom of the hopper, and so opened the doors and let out the spoil. Just as he did so a sea struck the hopper, and the deceased fell into the well and was carried with the spoil into the sea and was drowned. The County Court Judge held that the deceased man was at the time of the accident employed as a seaman, and that therefore the Act did not apply. He was also of opinion that the deceased was not employed at the time of the accident "on or in or about an engineering work" within the meaning of section 7, subsection 1, of the Act. He accordingly held that the appellant could not recover compensation. By section 7, subsection 1, of the Workmen's Compensation Act, 1897, "the Act shall apply only to employment . . . on or in or about . . . engineering work." By subsection 2 "engineering work means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used."

Mr. *Shepherd Little*, for the appellant, contended that the steam-dredging operations were an "engineering work" within the meaning of section 7, and the appellant, though at the time of the accident in the hopper, was employed on that

engineering work. The whole of the operations constituted one job, and it was necessary to take the mud out to sea, otherwise the dredging would have done no good. In section 7 most of the definitions denoted locality, such as factory, railway, mine, quarry. But "engineering work" denoted not locality, but the carrying out of certain operations.

Mr. *Ruegg*, Q.C., and Mr. *A. Powell*, for the respondents, contended that, even assuming that the work carried on by the dredger was an "engineering work" within the meaning of section 7, the deceased man was not killed while employed "on or in or about an engineering work." These words denoted locality, the place where the engineering works were being carried on, that was, on the dredger. The definition of "engineering work" in section 7, subsection 2, clearly indicated locality. The deceased man was killed a mile and a half away.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the judgment was right, but not upon the first ground relied upon by the County Court Judge. The deceased man was employed to a certain extent, on the steam-dredger. When a hopper was filled with the mud that was raised, it was the duty of two of the men on the dredger to go with the hopper a mile and a half out to sea and to deposit the mud there. In doing this the deceased man was killed. Was he, at the time of the accident, "on or in or about an engineering work" within the meaning of section 7 of the Act? The words preceding "engineering work"—namely, "railways, factory, mine, quarry," were obviously words of locality. For some time he had doubted whether the words "engineering work" pointed to locality, but he had come to the conclusion that they did, because, as Lord Justice Vaughan Williams pointed out, when one looked at the definition of "engineering work" in section 7, subsection 2, the words of the definition all pointed to locality. Therefore to come within the Act the deceased man must, at the time of the accident, be on or in or about the main locality of the

engineering work. There were two cases somewhat similar to the present. In *Powell* v. *Brown* (*ante*, p. 44) a workman in employment of certain factory owners was loading timber on to a cart of the factory owners standing in a street close to the entrance of the factory, and was injured. The County Court Judge held that the workman was at the time of the accident employed "about" the factory, and this Court affirmed his decision, holding that the word "about" included the case of close propinquity to the factory. Again, in *Lowth* v. *Ibbotson* (*ante*, p. 46), a carter in the employment of millers was injured while delivering sacks of flour a mile and a half from the mill, which was a factory within the meaning of the Act. The County Court Judge held that the employment was not "on or in or about a factory," and this Court upheld him. In the present case the deceased man was not at the time of the accident "on or in or about" the engineering work which was carried on in the dredger. He gave no decision upon any other question except that the employment was not "on or in or about" an engineering work at the time of the accident.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Solicitors: *Helder, Roberts, Son, & Co., for E. Atter, Whitehaven, for the appellant; W. Hurd & Son, for the respondents.*

Also reported (1899) 2 Q. B. 132; 68 L. J. Q. B. 740; 80 L. T. 586; 47 W. R. 533.

See *Lowth* v. *Ibbotson* (*ante*, p. 46); *Powell* v. *Brown* (*ante*, p. 44).

## FLOWERS *v.* CHAMBERS.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 352.

*On, or in, or about a Dock—Ship in Dock.*—SECT. 7, 1 & 2.

**Employment on a ship lying in a dock does not come within the Act.**

THIS was an appeal from an award of the Judge of the Bow County Court in an arbitration under the Workmen's Compensation Act, 1897. The injured workman was in the employment of a barge-owner and contractor, who undertook to discharge manure and refuse from cattle steamers into barges. At the time of the accident a ship was lying in the Victoria Docks for the purpose of being so discharged of refuse, and a barge was lying alongside. The workman was on the ship and was engaged in mooring the barge to the ship, when, by some accident, he fell from the upper to the lower deck and was injured. The operation was performed entirely by manual labour, no machinery being used. The County Court Judge made an award in favour of the workman. The employer appealed.

Mr. *J. D. Crawford* appeared for the appellant; Mr. *Candy*, Q.C., and Mr. *Pocock*, for the respondent.

The case of *Hall* v. *Snowden, Hubbard, & Co.* (*post*, p. 73) was referred to.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said they were now faced with a question which had been looming in the distance for some time—viz. whether a workman who was employed on a ship which was lying in a dock was employed on or in or about a dock within the meaning of the Workmen's Compensation Act. If the Legislature had intended to bring ships within the purview of the Act, nothing would have been easier than

to put in the word "ship" in the list of words included in the definition of "factory" in section 7 of the Act. The word "dock" was there, but "ship" was not, and they could not hold that a ship was a dock. The appeal must therefore be allowed. It was not necessary to decide whether this dock was included in the word "factory."

LORDS JUSTICES VAUGHAN WILLIAMS and ROMER concurred.

Solicitors: *Keene, Marsland, Bryden, & Besant, for the appellant; S. Benham, for the respondent.*

Also reported in (1899) 2 Q. B. 142; 80 L. T. 834.

See *Durrie* v. *Warren* (*post*, p. 78); *Medd* v *McIver* (*post*, p. 76).

Compare and see note to *Woodham* v. *Atlantic Transport Co.* (*infra*). See *Powell* v. *Brown* (*ante*, p. 44); *Lowth* v. *Ibbotson* (*ante*, p. 46) and *Chambers* v. *Whitehaven Harbour Commissioners* (*ante*, p. 47).

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## WOODHAM *v.* THE ATLANTIC TRANSPORT COMPANY (LIMITED).

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

(1898.) 15 *T. L. R.* 51.

*On, or in, or about—Dock—Machinery or Plant—Ship in Dock.*—SECT. 7, 1 *and* 2.

A ship in dock was unloading by means of an hydraulic crane standing on the quay. Employment on the ship at the end of the chain worked by the crane was held to be employment on, or in, or about a "factory," because the crane was machinery or plant used for the purpose of unloading the ship to the quay.

THIS was an appeal by the defendants from the decision of Judge French, Q.C., sitting at the Bow County Court, upon a question of law submitted to him by the arbitrator appointed to assess compensation under the Act. The plaintiff was the widow of William Woodham, and she claimed

compensation under the Workmen's Compensation Act, 1897, on behalf of herself and her five children for her deceased husband's death, caused by an explosion on board the defendants' steamship *Manitoba*. The following facts were admitted: On July 6, 1898, the late William Woodham was employed with other men by the defendants in unloading the steamship *Manitoba*, and was on that date killed while working on the *Manitoba* at the Royal Albert Docks, the cause of death being injuries received through an explosion of two cases of primers. The *Manitoba* belonged to the defendants, and was at the time of the accident lying at the quay of the Royal Albert Docks, No. 22 shed, moored thereto. The deceased, together with a number of other men, was sent by the foreman stevedore, Henry Webb (who was in charge on behalf of the defendants of the work of unloading), with instructions to unload and discharge the cases of cartridges that were stowed in the said vessel. The cases of cartridges were unloaded in the following manner: The vessel was lying by the side of the quay. The cases were brought from the hold by means of an hydraulic crane. The crane, which was standing on the quay, was worked by a chain, on the end of which chain was attached a wicker basket. The basket was at all times attached to the crane. The cases in question were brought out of the baggage-room of the *Manitoba*. The men, among whom was the deceased William Woodham, placed the cases into this basket, whereupon the crane was set in motion and the basket and its contents were hoisted from the vessel and placed on the quay. The crane was worked by a man named Woods, who was in the employment of the defendants. About 17 cases were safely landed by the crane, and the crane returned for the last set of cases, and the basket was being loaded by the said William Woodham and another man named William Connor. Four of the remaining five cases had been placed in the basket, and the fifth—the last case of all—being a case of primers, or percussion caps, was put into the basket by the deceased William Woodham, when it immediately exploded, and the

deceased William Woodham was struck, with others, by the exploded primers, or percussion caps, and killed. The *Manitoba* was unloaded on to the quay. The crane was hired by the defendants from the dock company. It appeared that two men were killed by this explosion and four were injured. Six claims for compensation were accordingly made, and the other five claims were to depend upon the decision in the present appeal. The question was whether the Act applied. By section 1, subsection 1, of the Workmen's Compensation Act, 1897, "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." By section 7, subsection 1, "This Act shall apply only to employment . . . on, or in, or about a railway, factory. . . ." By subsection 6, "Factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power." By subsection 3, "A workman employed in a factory which is a shipbuilding-yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard." By section 23, subsection 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory Acts were to have effect "as if (*a*) every dock, wharf, quay, and warehouse and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word 'factory' . . . and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises. . . ." The County Court Judge held that the word "dock" included the ship in the dock,

and gave judgment for the plaintiff for the agreed sum of £270. The defendants appealed.

Mr. *Joseph Walton*, Q.C. (Mr. *B. D. Kilburn* with him), for the defendants, said that to fit together this legislation was very like fitting together a puzzle. Taking section 1, subsection 1, and section 7 of the Workmen's Compensation Act, 1897, with section 23 of the Factory and Workshop Act, 1895, the question was whether this man was killed by an accident arising out of and in the course of his employment on or in or about a dock, wharf, or quay, or on, in, or about machinery or plant used in the process of loading or unloading therefrom or thereto. The first question that arose was whether a ship loading or unloading in a dock came within the word "dock" in the statute. That was a most important question for shipowners. Did the word "dock" include everything in the dock? The deceased man here was not employed in or about a "dock"; he was in the ship and was employed in or about "a ship." The word "dock" included only the land part of the dock. If the County Court Judge was right, every person employed in any capacity in or about the space covered by the dock and the enclosed water would come within the Act. The second question which arose was a narrower question—namely, Did the accident arise out of and in the course of the deceased man's employment on, in, or about machinery and plant used in the process of loading or unloading from or to the quay? The accident did not arise while the deceased was employed "about" the crane. The accident arose quite apart from the working of the crane. "About" the crane did not mean physical vicinity. The work must have some connection with the working of the crane itself. The County Court Judge was therefore wrong.

Mr. *G. H. Mallinson*, for the plaintiff, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that they would not express any opinion upon the first point as to whether this man was killed while employed in a "dock." The other

point seemed to him to be perfectly clear, and was decisive of the present case. The defendants were using a quay, and on the quay they used a crane to unload their ship. They employed the deceased man in the ship to help in unloading by means of the crane certain cases of cartridges. While he was so employed two of the cases exploded, and killed the deceased man. The question was, Did he come within the Workmen's Compensation Act, 1897? In his opinion the deceased man did. Reading section 1, subsection 1, and section 7 of the Workmen's Compensation Act, 1897, with section 23, subsection 1, of the Factory and Workshop Act, 1895, the words, so far as material, ran thus: If personal injury was caused to a workman by accident arising out of and in the course of his employment on, in, or about machinery or plant used in the process of loading or unloading to or from a dock, wharf, or quay, then the injured man was to be entitled to compensation. It was impossible to say that the deceased man was not in or about the crane. The Act therefore applied, and the judgment must be affirmed.

LORD JUSTICE RIGBY concurred. He desired to say that the appeal might have lasted a considerably longer time had it not been for the admirable and candid way in which Mr. Walton put before them the point which they had to decide.

LORD JUSTICE COLLINS concurred.

Solicitors: *W. Mitchell, C. J. Smith, & Hudson, for the various plaintiffs; Holman, Birdwood, & Co., for the defendants.*

Also reported in (1899) 1 Q. B. 15; 68 L. J. Q. B. 17; 79 L. T. 395; 47 W. R. 106.

Compare *Flowers* v. *Chambers* (*ante*, p. 51), which decided that a ship in a dock was not a factory, or, in other words, that employment on her was not employment on, in, or about a dock. Apart from the question of the employment being on or in a dock, it would appear that a distinction is drawn between the propinquity (see *Lowth* v. *Ibbotson*, *ante*, p. 46) of a dock that touches the side of the ship and in which the ship is, and of a crane standing on the dock, but the chain of which passes on board the ship.

See *Powell* v. *Brown* (*ante*, p. 44); *Chambers* v. *Whitehaven Harbour Commissioners* (*ante*, p. 47).

## MELLOR *v.* TOMKINSON & CO.

Before A. L. SMITH, CHITTY, and COLLINS, L.JJ.

(1899.) 15 *T. L. R.* 142.

*Building—Height—Construction, Repair, or Demolition by Machinery.*—SECT. 7, 1.

Buildings of whatever height, in course of construction, repair, or demolition, on which machinery driven by steam, water, or other mechanical power is being used for the purpose of such construction, repair, or demolition, come within the Act.

THIS was an appeal from an award of the Judge of the Liverpool County Court in an arbitration under the Workmen's Compensation Act, 1897. The claim was made by Thomas Mellor, a workman, to recover compensation from Messrs. James Tomkinson & Co., his employers, for accidental injuries suffered by him in the course of his employment, by reason of a piece of brick having gone into his eye, in consequence of which it became necessary to have the eye removed. The evidence was as follows: At the time of the accident the claimant was engaged in building a wall of a house in the Vauxhall-road. The wall was not then 30 feet in height. The claimant was on a scaffold just above the basement. Beams were being raised for the purpose of making a flooring. There was a pole run up about 20 feet, and guy ropes from the pole, and fastened to the top of the pole there was an iron wheel with a groove in it. An iron chain went over the top of the wheel. The guy ropes steadied the pole, and the pole also ran into the ground. One side of the chain was to hook the beam on, and the other side to pull the beam in. Six or seven men were at the beam and chain together—two to guide the beam, the rest at the chain. There was a brake on the wheel, which stopped the beam from running back. Section 7 of the Act provides as follows:—

"1. This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined, on or in or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof."

It was admitted at the trial on the part of the employers that a machine was being used which was driven by mechanical power. The County Court Judge thought the case came within section 7, and made an award in favour of the claimant. The employers appealed, and it was argued on their behalf that the employment in question was not on, in, or about any engineering work, or any building which exceeded 30 feet in height. The words "which exceeds 30 feet in height" governed all that part of the subsection which followed them. In other words, it was necessary in this case that the building should be 30 feet high, and also that there should be on it machinery driven by mechanical power.

Mr. *Clavell Salter* appeared for the employers; Mr. *Pickford*, Q.C., and Mr. *Segar*, for the workman.

The COURT, without calling on counsel for the respondent, dismissed the appeal.

LORD JUSTICE A. L. SMITH said the first point taken was that this was not a building on which machinery driven by mechanical power was being used. It had, however, been admitted at the trial on behalf of the employers that this was a machine driven by mechanical power. This point, therefore, was no longer open. It was then said that, as the wall was not 30 feet high, the case did not come within section 7. But he thought that the words "which exceeds 30 feet in height" were only coupled with the words "and is being constructed or repaired by means of a scaffolding, or being demolished"; and that the antecedent to the following words "or on which machinery driven by steam, water, or other mechanical power

is being used" was the word "building" simply, and not the words "building which exceeds 30 feet in height." Therefore, if the building was one on which machinery driven by mechanical power was being used, it was not necessary, in order to bring the case within the Act, that it should also be 30 feet high.

LORDS JUSTICES CHITTY and COLLINS concurred.

Solicitors: *Mackrel, Maton, & Co., for the employers; Crowders & Vizard, for the workman.*

Also reported in (1899) 1 Q. B. 374; 68 L. J. Q. B. 214; 79 L. T. 715; 47 W. R. 24; 63 J. P. 55.

Sect. 7, 1 of the Act comprises three classes of buildings:

1. Buildings over 30 feet in height being constructed or repaired by means of a scaffolding.
2. Buildings over 30 feet in height being demolished.
3. Buildings of whatever height in course of construction, repair, or demolition on which machinery driven by steam, water, or other mechanical power is being used for the purpose of such construction, repair, or demolition.

Chitty, L.J., in his judgment in this case cited and adopted the above from "Accidents to Workmen."

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## BILLINGS *v.* HOLLOWAY.

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

(1898.) 15 *T. L. R.* 53.

*Building which exceeds* 30 *Feet in Height.*—SECT. 7, 1.

A building, in order to exceed 30 feet in height, must exceed that height at the time of the injury.

THIS was an appeal under the Workmen's Compensation Act, 1897. It was an appeal by the plaintiff from the judgment of Judge Addison, Q.C., sitting at the Clerkenwell County Court. The plaintiff was a labourer in the employment of the defendant, a builder. The defendant was in July

last erecting a building in the Clerkenwell-road under a contract with the building owner. The building was to take the place of one which the defendant had previously demolished, and when erected according to the plans the new building would be a four-storeyed building over 30 feet in height. The new building was being erected by means of scaffolding, and during the course of the building operations a brick fell upon the plaintiff's head and injured him. At the time when the accident happened no part of the building had reached the height of 30 feet, the highest point of the building being 26 feet from the basement. The plaintiff having claimed compensation under the Act of 1897, the County Court Judge held that, as the building at the time of the accident was not more than 30 feet in height, the Act did not apply, and entered judgment for the defendant. By section 7, subsection 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment . . . on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . ."

Mr. *Bassett Hopkins*, for the plaintiff, contended that the Act applied if the building in course of erection was when finished to exceed 30 feet in height. Supposing a building exceeding 30 feet in height was being demolished, would the Act cease to apply the moment the building ceased to be more than 30 feet in height? The actual height of the building at the time of the accident was not the test. The test was what would be the height of the building when completed.

LORD JUSTICE COLLINS pointed out that the provision as to the building exceeding 30 feet in height might perhaps have been taken from section 23, subsection 2, of the Factory and Workshop Act, 1895.

Mr. *Ruegg*, Q.C., and Mr. *A. W. Groser*, for the defendant, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was

whether a workman who was working at a building which at the time did not exceed 30 feet in height, but which when completed would exceed that height, and who was injured, was entitled to claim compensation under the Act. He did not care to speculate whether the limit of height was taken from section 23 of the Factory and Workshop Act, 1895, or not. Section 1, subsection 1, of the Workmen's Compensation Act, 1897, provided that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman," his employer shall be liable to pay compensation. To see what employments were covered by the Act, it was necessary to turn to section 7. That section said that the Act should only apply to employment (*inter alia*) "on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding." Could any words be plainer? It was said that the Court ought to add the words "or which may hereafter exceed 30 feet in height." The Court could not add any such words. The appeal must therefore be dismissed.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

A question having been raised as to the costs of the appeal.

Mr. *Ruegg*, Q.C., said that he did not ask for costs.

Solicitor: *Charles Octavini Newman, for the plaintiff; Goldring & Philips, for the defendant.*

Also reported in (1899) 1 Q. B. 70; 68 L. J. Q. B. 16; 79 L. T. 396; 47 W. R. 105.

See *Hoddinott* v. *Newton, Chambers, & C.* (*post*, p. 62).

# HODDINOTT *v.* NEWTON, CHAMBERS, & CO. (LIMITED).

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 299.

*Height of Building—Construction or Repair—Scaffolding.*—SECT. 7, 1.

A building 28 feet high from the ground to the parapet, and 36 feet to the ridge of the roof, is a building that exceeds 30 feet in height.

Strengthening a building that has been constructed and is not in need of repair is not constructing or repairing it.

Scaffolding need not necessarily be on the outside of a building.

Scaffold boards, 8 feet high from the ground, resting on ledges secured to iron columns and supported in the middle by trestles, all within a building, amount to some evidence of "scaffolding."

Meaning of the expression "scaffolding" considered.

THIS was an appeal from the decision of Mr. Lushington, Q.C., the Judge of the Wandsworth County Court, in an application for compensation under the Workmen's Compensation Act, 1897. The claimant was the widow of a deceased workman, who was at the time of his death in the employment of the appellants, who were builders. It appeared that a stable had been built for the London General Omnibus Company about six months before the time of the accident, and was occupied by the company. After it was occupied, the company's engineer considered that it was requisite to strengthen the structure by putting in iron stays to prevent vibration. The appellants were employed by the company to put in the stays fastening together the columns and girders of the stable. For that purpose three planks were placed on two trestles about 8 feet from the ground, and the workmen stood on the planks while at work. These trestles and planks were removed each night on account of the horses in the stable. At the time of the accident the deceased man

was standing on the planks engaged in assisting to raise up one of the iron stays, when he overbalanced himself and fell off, and was killed. Two questions were raised—(1) whether the building was over 30 feet in height, and (2) whether it was being "constructed or repaired by means of a scaffolding" within section 7, subsection 1, of the Workmen's Compensation Act, 1897. The height from the ground to the parapet of the building was 28 feet, and from the ground to the top of the roof the height was 36 feet. The contention on behalf of the employers was that, inasmuch as nothing was being done to the roof, the height of the building must be taken, as in section 5 of the London Building Act, 1894 (57 and 58 Vict. c. ccxiii.), from the ground to the top of the parapet. It was also contended on their behalf that the building, if over 30 feet in height, was not being "constructed or repaired by means of a scaffolding," the work consisting of alterations to the building, and not repairs, and the arrangement of planks and trestles not being a "scaffolding." The County Court Judge decided both the questions in favour of the claimant, and awarded her £245 14*s.* as compensation. It appeared that the claimant had brought an action under the Employers' Liability Act, 1880, to recover damages, alleging that the planks and trestles were defective, but the County Court Judge gave judgment for the employers in this action, and then, upon the application of the claimant, the Judge proceeded, under section 1, subsection 4, of the Act of 1897, to settle the question of compensation under that Act. The Judge, as above stated, awarded the claimant £245 14*s.* as compensation, but deducted from this sum the costs of the witnesses called by the employers in the action under the Employers' Liability Act, 1880. The employers appealed.

Mr. *R. M. Bray*, Q.C., and Mr. *G. Spencer Bower*, for the appellants, contended that the work being done was not repairing work. Section 7, subsection 1, used the words "constructed and repaired" with reference to a building, the word "altered" was not used; whereas in the definition of "undertakers" in subsection 2 the words used in connection

with engineering work were "construction, alteration, or repair." Nor was the building being "constructed." Even, however, if it was being constructed or repaired, it was not being constructed or repaired by means of a "scaffolding." This arrangement of planks and trestles did not constitute a scaffolding; it was a mere temporary structure, and it was inside a completed building. Secondly, this building was not over 30 feet in height within the meaning of section 7, subsection 1, of the Act. The height from the ground to the parapet was that to be looked at. This was shown by section 5 of the London Building Act, 1894. And even if the building was 30 feet high, the scaffolding was not 30 feet high. The section must be read as making the Act apply to a building being repaired at the height of 30 feet by means of a scaffolding.

Mr. *Ruegg*, Q.C., and Mr. *Moyses*, for the respondent, argued that this was a case of the construction of a building. The building had never been properly constructed before, and it was being perfected. If it was not construction, it was repair. And it was by means of a scaffolding. The word "scaffolding" was not used in the Act in any technical sense, but in its colloquial meaning. It was not necessary for the scaffolding to be 30 feet high. The Act might be illogical, but the words were clear.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in this case an action had been brought under the Employers' Liability Act. The County Court Judge held that the case did not come within the Employers' Liability Act, and thereupon an application was made to frame a claim under the Workmen's Compensation Act. The accident happened in a building which had been erected by the London General Omnibus Company for stables. The first question was whether, for the purpose of satisfying the requirements of section 7, subsection 1, of the Workmen's Compensation Act, the height of building was to be measured to the top of the upright walls or to the top of the roof. He would leave the question as to the proper

method of measuring the height of underground buildings. With regard to this case, it was only necessary to say that the building was shown to be more than 30 feet in height up to the top of the roof; and, in his opinion, the applicant had thereby made out that the building exceeded 30 feet in height within the meaning of the Act. The next question was whether it was a building which was being either constructed or repaired by means of a scaffolding. With regard to the question whether the planks and trestles constituted a scaffolding, the County Court Judge had found that they did; and, in his opinion, it could not be said that there was no evidence of a scaffolding having been used. Speaking for himself, he thought it was immaterial whether that which was alleged to be a scaffolding was inside or outside a building. Neither did he think that the scaffolding need be 30 feet high. The Act did not say so. The words of section 7, subsection 1, were "Any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding." It did not say by means of a scaffolding 30 feet in height. He passed on to the question whether the deceased man was employed by the undertakers on a building which was being either constructed or repaired by means of a scaffolding. "Undertakers" were defined in subsection 2 of section 7, and were stated to be, in the case of a building, the persons undertaking the construction, repair, or demolition. Here the building was already completed, and was in actual use. After it was completed, something which was not in the original design was found to be necessary in order to strengthen it. Thereupon ironmasters were called in to put in girders for this purpose. Could it be said that the ironmasters were constructing the building? No; it had been already constructed. In his opinion, it was impossible to say that this was employment by the ironmasters on a building which was being constructed. In the case of an engineering work "undertakers" were defined to be persons undertaking the construction, alteration, or repair. But the Legislature, when they came to the case of a

building, left out the word "alteration." Then was this a case of repairing a building? In his opinion it was not. Nothing was out of repair; the building was a new building, which wanted something additional in order to strengthen the roof. Putting in that something additional was not repairing. He thought that the claim failed on the ground that this was not a case of employment on a building which was being constructed or repaired. The appeal must therefore be allowed.

LORD JUSTICE COLLINS was of the same opinion. He thought it was necessary to look at the provisions of the Act as a whole to see what the Legislature meant. The Act applied to employment by the undertakers as therein defined on any building which exceeded 30 feet in height, and was being constructed or repaired by means of a scaffolding, or being demolished. He thought that scaffolding must have some relation to the height of the building. It must be interpreted by reference to the nature of the work for which the Legislature contemplated it was to be used—*i.e.* in the construction or repair of a building exceeding 30 feet in height by an undertaker, who was defined to be the person undertaking the construction, repair, or demolition. This definition threw some light upon the question what sort of operation the Legislature was contemplating. It was the construction, repair, or demolition of a building, which would *prima facie* suggest the building as a whole. And the operation to which scaffolding was contemplated as an essential would seem, therefore, to be *prima facie* the work of constructing or repairing such a building as a whole, an operation to which a scaffolding was essential. It was not necessary, and it would be impossible to define what was the exact legal meaning of scaffolding as used in this connection, nor was it necessary to decide whether something short of construction or repair of a building over 30 feet high as a whole, carried out by means of a scaffolding in the full sense of the term, such as might be used for dealing with a building over 30 feet high, might not be within the Act. But though

definition was difficult or impossible, it was possible to say as to certain cases that they fell within or without the Act. It seemed to him that the present case could not be brought within the Act without straining the particular words at the expense of the general intention. It was impossible to suppose that the Legislature fixed 30 feet as an arbitrary line having no relation to the actual risk provided against, so that, when a building had once reached 30 feet high, any operation which could be called construction or repair of any part of the building inside or out, however near the ground, where the workman had to stand on an arrangement which might be termed scaffolding in order to reach it, would be within the Act, and give him a remedy if he fell. Such an interpretation would give no reasonable ground for the introduction of 30 feet at all. It never could have been meant to cover the case of a man employed to put up a rod to hang pictures on in a drawing-room, though he supported himself on a platform, which could be called a scaffolding, in order to do it. It was obvious that the height of the house could have no bearing whatever on the risk of such an operation. It might be said that was not a case of repair, but no more was the case before the Court. But the same observation would apply to whitewashing a ceiling. He came to the conclusion that the case did not come within any view which could possibly be taken of the intention of the Legislature.

LORD JUSTICE ROMER delivered judgment to the same effect.

Solicitors: *Ingle, Holmes, & Sons, for the appellants; C. F. Appleton, for the respondent.*

Also reported in (1899) 1 Q. B. 1018; 68 L. J. Q. B. 495; 80 L. T. 558; 47 W. R. 499.

As to scaffolding, see *Wood* v. *Walsh* (*post*, p. 68); and *Stack* v. *Counsell Bros.* (*post*, p. 133).

As to repair, see *Wood* v. *Walsh* (*post*, p. 68).

## WOOD *v.* WALSH & SONS.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 279.

*Repair—Scaffolding.*—SECT. 7, 1.

Painting the outside of a building is not "repair."
A ladder leaning against the outside of a building is not scaffolding.

THIS appeal raised a very important question affecting a large class of workmen—whether the Workmen's Compensation Act, 1897, applies to painters engaged in painting the outside of a house by means of ladders—that is to say, whether the employment is on, in, or about a building which is being "repaired" by means of a "scaffolding," within the meaning of section 7, subsection 1, of the Act. The appeal was from the decision of Judge Greenhow, sitting at the Leeds County Court, upon a case stated by an arbitrator appointed to settle a claim for compensation under the Workmen's Compensation Act, 1897. The claim was by the widow of a deceased workman who was killed while in the employment of the appellants, Messrs. Walsh & Sons, who were painters and decorators at Leeds. The deceased man was at the time of the accident employed with several other men in cleaning and painting the outside of a house over 30 feet in height at Leeds. The work was being done by means of five or six long ladders, and consisted of removing the dirt and blisters, making good the woodwork with putty and the stonework with hall-plaster or cement, and afterwards painting the surface. Nothing was being done to the building except preparation for painting and the actual painting. The deceased man was standing upon the rung of one of the ladders, which was resting against the wall, engaged in puttying and painting, when the rung of the ladder broke,

and he fell to the ground and was killed. One of the workmen at work had placed a plank with one end resting upon and tied to the rung of one of the ladders and with the other end resting upon a window-sill, and stood upon this plank to work, but the deceased man had not used this plank. The claim for compensation was referred to a barrister as arbitrator under para. 2 of schedule II. of the Act, who held that the building was not being "repaired" within the meaning of section 7, subsection 1, of the Act, and that neither the ladders nor the arrangement of the plank resting on the ladder and the window-sill were "scaffolding" within the meaning of that section. He accordingly held that the deceased was not killed while engaged in any employment within the Act, and made his award in favour of the employers, but submitted two questions of law for the decision of the County Court Judge—(1) whether the building was being "repaired" within the meaning of the Act; and (2) if so, whether it was being repaired by means of a "scaffolding" within the meaning of the Act. The County Court Judge reversed the decision of the arbitrator upon both points, and awarded the claimant an agreed sum of £237 18*s*. The employers appealed. By section 7, subsection 1, of the Workmen's Compensation Act, 1897: "This Act shall apply only to employment . . . on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

Mr. *C. A. Russell*, Q.C., and Mr. *Clarke Hall*, for the appellants, contended that this was not a building which was "being constructed or repaired by means of a scaffolding" within the meaning of section 7, subsection 1, of the Act of 1897. In so far as these were questions of fact the arbitrator had decided them in favour of the appellants, and an appeal only lay from him on a question of law. First, this was not "repair." The Act spoke of repair by means of a scaffolding. That was an indication of the kind of repair intended—namely, repair of a structural character, and not mere decorative work. It could not be said that merely whitewashing

or painting a house was doing repairs to it within the meaning of this Act. Secondly, the repairs, if any, were not being done by means of a "scaffolding." The ladders were clearly not "scaffolding." Nor was the arrangement of the ladder and the plank "scaffolding." The arbitrator found as a fact that it was not. If it were, a plank resting on two ladders, which painters frequently used for whitewashing the ceiling of a room, would be a "scaffolding." Even, however, if this arrangement of plank and ladder could be called a scaffolding, it did not follow that the building was "being repaired by means of a scaffolding," only a small part of the work being done by means of the scaffolding. Because one workman chose to put a plank from the ladder to the window-sill, for his own convenience, that did not bring every workman engaged on the building within the Act. Supposing there was a scaffolding at the back of the house used by bricklayers for repairing that part of the house, and painters were employed by the same master in painting the front of the house, the latter would not be employed in repairing the house by means of a scaffolding. They submitted that the decision of the County Court Judge was wrong.

Mr. *Robert Wallace*, Q.C., and Mr. *Horace Marshall*, for the claimant, contended that the work the deceased man was engaged on was "repair" within the meaning of section 7, subsection 1. "Repair" meant the restoration of the building to its proper condition as fit for use and occupation. There might, perhaps, be painting of such a purely decorative character as to be outside any meaning of the word "repair." But here there was making good the wood and stone work and painting the outside to keep it from decaying. There was a restoration of the fabric of the house. The ordinary covenant to repair and keep in repair would include work such as this, so as to keep the woodwork in proper condition. Therefore the building was being "repaired" within the meaning of the Act. Secondly, the ladders used in the work constituted a "scaffolding" within the meaning of the Act. The word "scaffolding" was used in this Act in its popular

sense, and included anything used outside the building for the purpose of repairing it. The suitability of the thing for the purpose was the test. Again, if the ladders were not "scaffolding," the arrangement of plank and ladder was. A small platform hoisted up the front of the house by means of ropes and pulleys, which painters frequently used for painting the outside of a house, would come within the term "scaffolding" in the Act. So also would the arrangement of the plank resting on the ladder and the window-sill. The decision of the County Court Judge was therefore right. If this kind of employment was not within the Act, the effect would be to shut out a large class of workmen from the benefits of the Act.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the argument had been frequently pressed upon them that if they decided a particular case in a certain way a large number of persons would be excluded from the Act. They had power only to construe the Act. But this he would say—that it was clear upon the face of the Act that every workman was not brought within the Act, but only certain classes of workmen, and the rest were left outside. The question was whether this case came within the Act. The deceased man was engaged in painting the outside of a house. Ladders were used for the purpose. On one ladder there was a plank with one end tied to the rung of the ladder and with the other end resting on a window-sill. The deceased man was not working on that plank. He was on a rung of one of the ladders, when the rung broke, and he fell and was killed. There could be no doubt that the Legislature, when they passed the Act, knew well what was conveyed by the terms "ladder" and "scaffolding." There could also be no doubt that they knew what was conveyed by the terms "painting" and "repairing." Though in some respects section 7 might be a most difficult section to construe, in the present case he (the Lord Justice) did not see the difficulty. Was this house "being constructed or repaired by means of a scaffolding" within the meaning of

section 7, subsection 1? First of all, was it being "constructed or repaired"? It clearly was not being "constructed." Was it being "repaired"? The word "repaired" did not, in his opinion, include the mere painting of the outside of the house. The arbitrator had found as a fact that nothing was being done to the building except preparation for painting and the actual painting. Ordinary painting was not repairing. If the Legislature had intended to include it they would have said so in plain language. On the contrary, they had used language which was plain and clear—"constructed or repaired"—and those words did not include painting. Next, as regards the meaning of the word "scaffolding." Was the ladder a "scaffolding" within the meaning of the Act? Who in his senses would speak of repairs done by means of a ladder as repairs done by means of a scaffolding? Here, again, if the Legislature had intended it they would have said so. They had confined the case to repairs by means of a scaffolding. A ladder did not come within that term. It was then said that the arrangement of the plank and the ladder converted the thing into a scaffolding. That seemed to him to be a question of fact, and the arbitrator had found that it was not a scaffolding. He was not going to attempt to define what was or was not a scaffolding, as he could see that they would have many appeals brought before them raising the question what was or was not a scaffolding. The deceased man was therefore not employed on, in, or about a building which was being constructed or repaired by means of a scaffolding within the meaning of section 7, subsection 1, of the Act, and therefore the claimant was not entitled to compensation under the Act.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER agreed.

Solicitors: *Lawson, Coppock, & Hart, Manchester, for the appellants; Arthur Willey, Leeds, for the claimant.*

For the appellants, *Mellor* v. *Tomkinson* (*ante*, p. 57) was cited.

Also reported in (1899) 1 Q. B. 1009; 68 L. J. Q. B. 492; 80 L. T. 345; 47 W. R. 504; 63 J. P. 212.

As to repair and scaffolding, see *Hoddinott* v. *Newton, Chambers & Co.* (*ante*, p. 62); and as to scaffolding, *Stack* v. *Counsell Bros.* (*post*, p. 133).

## HALL *v.* SNOWDEN, HUBBARD, & CO.

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

(1899.) 15 *T. L. R.* 326.

*Wharf—Application of Factory Acts.*—SECT. 7, 2.

**A dock, wharf, quay, warehouse, machinery, or plant does not come within section 7 of the Act unless some provision of the Factory Acts is applied to it by the Factory and Workshop Act, 1895, and some such provision has been enforced with respect to it.**

THIS was an appeal from an award of the Judge of the Bloomsbury County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant was the son and only dependant of Charles Hall, a workman who had met with his death in consequence of an accident arising out of and in the course of his employment. The employers, Snowden, Hubbard, & Co., were the occupiers of a wharf called Platt's Wharf, which abutted on the Regent's Canal, and which was used by them for the purpose of loading liquid mud and road sweepings into barges lying in the canal. The wharf was simply a yard, and no machinery of any kind was used on it. At the time of the accident a firm of contractors, Messrs. Read Brothers, were engaged in laying down water-pipes between the St. Pancras Electric Lighting station and the Regent's Canal, and these pipes passed through Platt's Wharf. Snowden, Hubbard, & Co. had contracted with Read Brothers for the carrying away of the soil cast up by the making of the trench in which the pipes were laid. The deceased, who was a general carter in the employment of Snowden, Hubbard, & Co., had loaded a cartful of soil on the wharf, and was leading the horse and cart out of the wharf into the street and was himself walking backwards. A trolley laden with water-pipes was standing in the street,

but the deceased, not observing this, continued walking backwards and came against the pipes and was crushed and killed. The County Court Judge held that the accident arose out of and in the course of the employment of the deceased, but that Platt's Wharf was not a factory within the meaning of the Workmen's Compensation Act. He accordingly decided that the applicant was not entitled to compensation. The applicant appealed.

Mr. *C. A. Cripps*, Q.C., and Mr. *Bailhache*, for the appellant, relied on section 7, subsection 2, of the Workmen's Compensation Act, which enacts as follows: "In this Act 'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power." Section 23 of the Factory Act, 1895, said that certain provisions of the Acts should have effect as if every dock, wharf, quay, and warehouse were included in the word "factory." Among the provisions so specified were the provisions of section 18 of the Factory Act, 1895, as to notices of accidents, and those of section 68 of the Factory Act, 1878, as to the powers of inspectors. All those provisions were just as applicable to an ordinary wharf as to a wharf to which dangerous machinery was attached. On this ground they contended that the wharf in question came within the word "factory" as used in the Workmen's Compensation Act. They also argued that, on the true construction of the definition of "factory" in subsection 2 of section 7, the words "to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895," referred only to "machinery or plant," and that the definition was intended to include every dock, wharf, quay, or warehouse. Every wharf, that was obviously a wharf, was a factory within the Act.

Mr. *Bray*, Q.C., and Mr. *Herbert Smith*, for the respondents, argued that, if the Legislature had meant that every wharf

was to be deemed to be a factory within the meaning of the Act, they would have expressed it clearly. The provisions of the Factory Acts which had been referred to were not applicable to this wharf so as to bring it within the meaning of "factory" by virtue of section 7, subsection 2, of the Workmen's Compensation Act. Section 18 of the Factory Act, 1895, would not apply to this accident; for it dealt only with an accident occurring "in a factory." Neither did section 68 of the Factory Act, 1878, apply to this wharf. It was absurd to suppose that an inspector could have examined this workman, because he happened to be casually employed on this wharf on the day of the accident.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether the respondents' wharf was a factory within the meaning of the Workmen's Compensation Act. Section 7, subsection 1, said that the Act was to apply to employment on or in or about a factory. Subsection 2 gave a definition of "factory," making the word include "any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." He thought that the words "to which any provision, etc.," applied to the whole budget of words that went before, and not merely to machinery and plant. The wharf in question was clearly not a factory *per se*, and it could only be brought within the meaning of the word "factory" by showing that some of the provisions of the Factory Acts were applied to it by the Factory Act, 1895. It was said that two such provisions were so applied to it. The first was the provision as to notices of accidents contained in section 18 of the Factory Act, 1895. He thought that Mr. Bray had given a good answer to this—viz. that notice of accident need only be given under section 18 when an accident has occurred in a factory or workshop. In this case no accident had happened on the wharf, and therefore section 18 was not made applicable to this wharf. The second provision which was said to be applicable to this wharf was section 68 of the Factory and Workshop Act,

1878, which dealt with the powers of inspectors. It was contended that this wharf could be inspected under that section. The section, however, gave power to an inspector to enter any place which he had reasonable cause to believe to be a factory or workshop. He did not think that that section could have any application in this case. He was, therefore, of opinion that the County Court Judge was right in holding that this wharf was not a factory within the Workmen's Compensation Act.

LORDS JUSTICES COLLINS and VAUGHAN WILLIAMS concurred.

Solicitors: *Riddell, Vaizey, & Smith, for the appellant; Marshall & Pridham, for the respondent.*

Also reported in (1899) 2 Q. B. 136; 68 L. J. Q. B. 645; 80 L. T. 554; 47 W. R. 486.

The effect of this decision is this. Although section 23 of the Factory and Workshop Act, 1895, has applied certain provisions of the Factory Acts to "every dock, wharf, quay, and warehouse," the Workmen's Compensation Act does not apply unless some one of those provisions has been put in force in respect to that particular dock, wharf, quay, or warehouse. Presumably the workmen must give affirmative evidence of this fact.

Compare *McNicholas* v. *Dawson* (*post*, p. 80).

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## MEDD *v.* D. & C. MAC IVER.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 364.

*Plant used in loading or unloading a Ship.*—SECT. 7, 2. *Factory and Workshop Act*, 1895, *s.* 23.

Iron gangway doors in the side of a ship through which cargo is taken and discharged are not plant used in the process of loading or unloading.

THIS was an appeal from an award of Judge Shand, the Judge of the Liverpool County Court. The appellant, Medd, was in the employment of the respondents. The appellant was a ship's labourer employed with other men, when the ship's

crew were discharged, on a ship called the *Lake Huron*, in moving her from one part of a dock to another. There were two large iron gangway doors in the ship's side through which the cargo was taken into and discharged from the ship. The appellant was ordered to close these iron doors before the ship was moved. In doing so his thumb was taken off. The County Court Judge held that the ship in the dock was not a "factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897, as defined by section 23 of the Factory and Workshop Act, 1895; that the respondents were not, therefore, the occupiers of a factory within the section; and that the gangway doors were not "machinery or plant" used in the process of loading or unloading to or from a dock, wharf, or quay, within the meaning of section 23, subsection 1 (*a*), of the Factory and Workshop Act, 1895. He accordingly made his award in favour of the respondents.

Mr. *Blackwood Wright*, for the appellant, said that the question whether employment on a ship in a dock was employment in a dock within the meaning of section 7 of the Act of 1897 had been decided in the negative in *Flowers* v. *Chambers* (*ante*, p. 51), and therefore the first two points taken before the County Court Judge were not open to him. The third point was the only one open—namely, that the gangway doors were "machinery or plant" used in the process of loading or unloading from a dock within section 23, subsection 1 (*a*), of the Factory and Workshop Act, 1895, which was incorporated by section 7, subsection 2, of the Workmen's Compensation Act, 1897, in the definition of "factory."

Mr. *Pickford*, Q.C., and Mr. *L. Sanderson*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it was perfectly clear that these gangway doors in the ship were not "machinery or plant" used in the process of loading or unloading within section 23, subsection 1 (*a*), of the Act of 1895.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Solicitors: *Tippets & Son*, for *J. W. Wall, Bootle, for the appellant; Field, Roscoe, & Co., Batesons, Warr, & Wimshurst, Liverpool, for the respondents.*

See *Flowers* v. *Chambers* (*ante*, p. 51); *Woodham* v. *Atlantic Transport Co.* (*ante*, p. 52); and *Durrie* v. *Warren* (*infra*).

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## DURRIE *v.* WARREN & CO.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 365.

*Ship in Dock—Staging—Employment—Dock.*—SECT. 7, 2.—*Factory and Workshop Act*, 1895, *s.* 23.

Employment on staging affixed to the outside of the ship does not come within the scope of the Act.

THIS was an appeal from an award of the Liverpool County Court Judge upon proceedings to assess compensation under the Workmen's Compensation Act, 1897, and raised a similar point to that in the last case. The appellant was the father of a boy who was drowned while in the employment of the respondents, Warren & Co. The boy was working on staging fastened outside a ship belonging to the respondents in a dock, being engaged in assisting to screw up the iron doors of the ship after the loading was completed. While doing so he fell off the staging and was drowned. The County Court Judge made his award in favour of the respondents.

Mr. *G. Segar*, for the appellant, said that a point was taken before the County Court Judge that this boy did not die by an accident, but the Judge pooh-poohed that. Another

point taken was that the respondents, the shipowners, were not the occupiers of the dock, and the respondents' counsel were, he understood, prepared to argue that point at considerable length now. He contended that the respondents were the occupiers of the dock within the meaning of section 23, subsection 1, of the Factory and Workshop Act, 1895. [LORD JUSTICE A. L. SMITH: If the Legislature had intended to include a ship, why did they not say so?] He did not say that the Legislature intended to include a ship, but they had included it by accident, as very often happened. Further, staging on which the boy was employed was "machinery or plant" used in the process of loading, within the meaning of section 23, subsection 1 (*a*), of the Factory and Workshop Act, 1895.

Mr. *Carver*, Q.C., and Mr. *Maurice Hill*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this point about the ship was decided in *Flowers* v. *Chambers* (*ante*, p. 51). A ship in a dock was not a "dock." The deceased was employed on a ship and not in a dock. Nor was the staging outside the ship machinery or plant used in the process of loading or unloading to or from a dock.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Solicitors: *G. J. Lynskey, for the appellant; Rowcliffes, Rawle, & Co., for Hill, Dickinson, & Co., Liverpool, for the respondents.*

The "last case" referred to was *Medd* v. *McIver* (*ante*, p. 56). See *Flowers* v. *Chambers* (*ante*, p. 51); *Woodham* v. *Atlantic Transport Co.* (*ante*, p. 52).

## McNICHOLAS *v.* DAWSON.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 242.

*Dangerous Machinery—Factory.*—SECT. 7, 2. *Factory and Workshop Act*, 1895, *s.* 23.
*Arising out of and in the course of—Implication of Fact.*—SECT. 1, 1.

A steam-engine in a shed connected with a mortar-pan for mixing mortar to be used on another building is a factory.

In the absence of evidence, the fact that an accident arose out of and in the course of the employment may be implied.

THIS was an appeal from the decision of Judge Bompas, Q.C., sitting at the Bradford County Court in proceedings to recover compensation under the Workmen's Compensation Act, 1897. The case raised two questions of importance, one being of considerable difficulty owing to the Act defining "factory" by reference to the provisions of the various Factory Acts. The appellant was the widow of a deceased workman, named Patrick McNicholas, who at the time of the accident causing his death was a workman in the employment of the respondents, Messrs. Dawson & Son, who were builders engaged at the time in erecting a post-office and some other buildings. McNicholas was employed to look after a steam-engine in an engine shed and a mortar-pan, his duty being to fire the boiler, to start the engine and oil it, and to oil and feed a mortar-pan, which was outside the engine shed in the open air. The engine was used for grinding mortar for the post-office, from which it was distant about 20 yards. Across the middle of the engine shed was a revolving shaft worked by the engine and placed about 4 feet from the ground. The engine shed had a full-sized door at the side furthest away from the mortar-pan, and there was a small door 4 feet high at the side of the shed nearest to the mortar-pan. This

small door was sometimes used for ventilating the engine-shed, and it opened from the inside, and the man working at the engine would have to pass under the shaft to go to this door. The deceased man had been forbidden to go out of the shed by this small door. Upon the morning of August 6, 1898, at about 6.55 a.m., the deceased man called to an outdoor labourer named Smith, who was employed at the mortar-pan, asking him if he was ready, and upon being answered in the affirmative, the deceased started the engine, and about two minutes afterwards Smith heard a rattling noise, and upon going into the engine shed he saw, as he stated in his evidence, a bundle going round the shaft, and he stopped the engine and found it was the deceased man, who died shortly afterwards. No one saw how the accident happened. It was the duty of the deceased man, after having started the engine, to go to the mortar-pan. The evidence showed that the proper way to the mortar-pan was by the main door, and that if the deceased man wished to go out by the small door he would have to creep under the shaft in order to reach it. The oil-can used for oiling the engine was found on the shelf where it was kept when not in use, thus showing that the accident did not happen when the deceased man was oiling the engine. Two main questions were raised. First, whether the accident arose out of and in the course of the employment, within section 1, subsection 1, of the Workmen's Compensation Act, 1897; and, secondly, whether the steam-engine was a "factory" within the meaning of section 7 of the Act. There was also a question whether the deceased man, in disobeying his masters' orders not to use the small door, was guilty of "serious and wilful misconduct," within section 1, subsection 2 (*c*), of the Act, so as to bar the claim for compensation. The County Court Judge, in his judgment, said that the engine shed and the engine were a "factory" within section 7 of the Workmen's Compensation Act, 1897; that the deceased man had not been guilty of serious and wilful misconduct; and upon the question whether the accident arose out of and in the course of the employment, he said

that in the circumstances it was probable that the deceased man was trying to creep under the shaft, and was caught by it while doing so; that his duty after he had started the engine was to go out of the front door to the mortar-pan, and that this would not have required him to go near the shaft; that the deceased was probably "in the course of" his employment when the accident happened, but that the appellant must go further and prove that the accident arose "out of" the employment: *Smith* v. *Lancashire and Yorkshire Railway Company* (*ante*, p. 1); and that the evidence showed that the ordinary course of duty of the deceased would not have taken him near the shaft, and that no evidence showed what induced him to go near the shaft; that it might have been some object of his own, or it might have been his intention to go out of the small door, which he was forbidden to do, and which his employment in no way necessitated. It was true that it might have been something connected with the engine which his duty required him to perform, in which case the accident would have arisen out of the employment; but in his opinion it was left absolutely uncertain whether it did or did not arise out of the employment, the balance of probabilities being rather that it did not; and as the burden of proof was on the appellant, he held that she had failed to prove that the accident arose out of the employment, and he therefore gave judgment for the respondents. The appellant appealed. By section 1, subsection 1, of the Workmen's Compensation Act, 1897, "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman," his employer shall be liable to pay compensation. By subsection 2 (*c*), "if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any claim to compensation in respect of that injury shall be disallowed." By section 7, subsection 1, "This Act shall apply only to employment . . . on or in or about a railway, factory. . . ." By subsection 2, "'factory' has the same meaning as in the Factory

and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. . . ." By section 23, subsection 2, of the Factory and Workshop Act, 1895, "The following provisions—namely, . . . V. The provisions of this Act with respect to the power to make orders as to dangerous machines shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word 'factory.' . . ."

Mr. *Macaskie* and Mr. *E. W. Perkins*, for the appellant, contended that the accident arose out of and in the course of the employment. Even if the deceased man was attempting, contrary to his orders, to pass under the shaft so as to go out by the small door, it would still be in the course of his employment, as it was his duty to go to the mortar-pan, and the accident would have arisen out of the employment.

Mr. *Ruegg*, Q.C., and Mr. *A. Powell*, for the respondents, contended that the appellant had not shown that the accident arose out of and in the course of the employment. If the deceased man was going out of the small door, he was doing what he was forbidden to do, and in such a case it could not be said that the accident arose out of and in the course of the employment. Everything was left in doubt, and the appellant had not discharged the onus upon her. Secondly, this was not an employment within the Act. It was not a "factory" within the definition in section 7, subsection 2. It was admitted that this was not a factory within the Factory Acts, 1878 to 1891. To make it a factory it must come within that part of the definition "dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act,

1895." These words referred to section 23, subsection 1 (v.) (*a*), of the Factory and Workshop Act, 1895, where the words were repeated, and did not refer to clause (v.) (*b*), which related to premises on which machinery was. The material words in this case of the definition in section 7, subsection 2, of the Act of 1897 were "machinery or plant," and section 23, subsection 1 (v.) (*b*), only applied to "premises" on which no doubt machinery was used. These temporary sheds used in connection with building operations were never intended to come within the definition of factory, and so to be brought within the Act of 1897.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the first point taken was that no evidence was given that the accident to the deceased man arose out of and in the course of the employment. Would not any one say, upon the facts proved here, that the accident arose out of and in the course of the employment? The deceased man started the engine on the morning in question, and two minutes afterwards he was killed. The County Court Judge said that it was consistent with the evidence that the deceased man might have been going towards the small door for the purpose of going out of the shed that way, which he was expressly forbidden to do, and that therefore it was not proved that the accident arose out of and in the course of the employment. That holding came to this, that if a workman went by a wrong way from one point of his employment to another, an injury happening to him while doing so would not arise out of and in the course of his employment. The learned Judge felt himself hampered by the decision in *Smith* v. *Lancashire and Yorkshire Railway Company* (*ante*, p. 1), a case which also came upon appeal from him. In that case a ticket-collector, after he had finished collecting the tickets, jumped on to the footboard of the train after it had started, and made a remark to some one, and was killed in getting off. The learned Judge in that case found as a fact that "the deceased was not actually engaged in any act of service at the time of the

accident, and did not get on to the footboard for any object of his employers, but for his own pleasure." In face of that finding this Court held that the accident did not arise "out of" the employment. How on earth could this Court have held otherwise in the face of a finding of fact that the deceased man got on the footboard solely for his own pleasure? In the present case, assuming everything against the appellant, assuming that the deceased man was going out of the engine shed by the small door, which he was forbidden to do, and assuming that he acted rashly and negligently in doing so, how could the Court absolve the employers from liability in the absence of serious and wilful misconduct on the part of the deceased, which the Judge had negatived in this case upon the ground that the accident did not arise out of and in the course of his employment? In his Lordship's opinion, putting the case most favourably to the respondents, the accident to the deceased arose out of and in the course of his employment. Upon that point, therefore, he was unable to agree with the decision of the County Court Judge. The next question was an important one—namely, whether the employment of the deceased man came within the Act of 1897. Was he employed on, or in, or about a "factory" within the meaning of section 7, subsection 1? To get at the definition of factory one must look at subsection 2 of that section. "Factory" was to include, among other things, any machinery to which any provision of the Factory Acts was applied by the Factory and Workshop Act, 1895. Turning to section 23 of the Factory and Workshop Act, 1895, it seemed to him that the Legislature had, by subsection 1, clause (v.) (*a*) and (*b*), made certain things factories to which the provisions of the Act with respect to the power to make orders as to dangerous machinery were to apply. Supposing the machinery specified in clause (*b*) was defective, would not justices have power to make orders with respect to it? In his opinion the machinery specified in clauses (*a*) and (*b*) were both brought within the definition of "factory" in section 7, subsection 2, of the Act

of 1897. In his opinion the engine in the present case came within section 23, subsection 1 (v.) (*b*), inasmuch as it was worked by steam for the purpose of grinding mortar, and was temporarily used for the purpose of structural work in connection with a building. The engine therefore came within the definition of a factory in section 7, subsection 2, of the Workmen's Compensation Act, 1897. The judgment of the County Court Judge must therefore be reversed.

LORD JUSTICE COLLINS was of the same opinion. The evidence showed that the deceased man's duty was to fire the boiler, to start the engine, to oil it, possibly to open the small door to ventilate the shed, and to go out to the mortar-pan. The evidence was that on the morning in question he started the engine, and in two minutes he was found involved in the machinery. The question was whether those facts amounted to evidence that the accident arose out of and in the course of his employment. His Lordship agreed that the onus of proving that lay upon the appellant. It came to this, Was there evidence to go to a jury that the accident arose out of and in the course of his employment, because the County Court Judge did not decide upon the evidence, but said in effect that there was no evidence fit for the consideration of a jury? The highest that the case could be put against the deceased man was that he was killed while attempting to go out of the engine shed by a dangerous way under the shaft, which he was told not to do. But it was just as much part of his duty to get out of the engine shed as to go into it, and it was in the course of his employment to do either. The Workmen's Compensation Act, 1897, did not make negligence in the employer a condition of recovering compensation. It was not necessary to prove negligence in the employer, and it was no answer to a claim for compensation to prove negligence on the part of the claimant. If the claimant showed that the accident arose out of and in the course of the employment within the Act, then the employer, in order to escape liability to pay compensation, must show that the injury was attributable to the serious and

wilful misconduct of the workman. The consideration of mere negligence, therefore, was out of place, and it was sufficient if the claimant could show that the accident arose out of and in the course of the employment, though the workman might have been negligent at the time. Very probably there might be such a negligent act on the part of the workman so entirely outside his employment as would make the negligent act causing the injury not within the course of his employment at all. But here the accident arose out of and in the course of the employment, and, if there was any negligence at all, it occurred in the course of the employment. There remained the second question. Section 7, subsection 1, enacted that the Act should extend to employment on or in or about a "factory." It was contended that this was not a factory within the meaning of the Act. That compelled the Court to examine what he must call this extraordinary mode of legislation upon the point. A factory was defined by reference to the Factory Acts, 1878 to 1891—it was admitted that this case did not come within those Acts—and it was further defined as including any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts was applied by the Factory and Workshop Act, 1895. That obliged him to refer to section 23 of the Act of 1895. That section applied a number of provisions in the Factory Acts as to dangerous machines to certain subject-matters therein specified. The principle of the section was that it constituted certain things a "factory"; by subsection 1, clause (v.) (*a*), it constituted certain things, including machinery and plant used in certain processes, a factory; and by clause (v.) (*b*) it constituted something else, which was not machinery alone, a factory—namely, premises on which machinery worked by steam, water, or other mechanical power was temporarily used for the purpose of the construction of a building or any structural work in connection with a building. It was said that clause (*b*) did not constitute the machinery a factory. But the legislation was for the purpose of enabling the authorities to make provision as to

dangerous machinery, and on looking at it it was addressed to dangerous machinery in a factory. That explained why one must first get the factory. Turning back to section 7, subsection 2, of the Workmen's Compensation Act, 1897, one found that the word "factory" included machinery to which any provision of the Factory Acts was applied by the Factory and Workshop Act, 1895. In the Act of 1895 one found that premises on which certain machinery was was made a factory, and to that machinery the provisions of the Act were to be applied. Therefore, the machinery became a factory within the meaning of the Workmen's Compensation Act, 1897, and so there was a factory within a factory. By this indirect legislation there was this machinery in a factory, which machinery was itself a factory. The machinery, therefore, in this case became a factory, and the deceased man was employed on or in or about a factory at the time when he met his death.

LORD JUSTICE ROMER delivered judgment to the same effect.

LORD JUSTICE A. L. SMITH asked whether the case must go back to the County Court Judge.

Mr. *Perkins* stated that the compensation had been agreed at £180 1*s.* 11*d.*, and

The COURT gave judgment for the appellant for this amount, the County Court Judge to apportion it between the widow and the children; the appellant to have the costs in the County Court and on the appeal.

Mr. *Ruegg*, Q.C., applied for a stay of execution pending an appeal to the House of Lords, if such an appeal were decided upon, as the decision involved consequences of serious importance to the building trade.

The COURT refused to stay execution.

For the respondents, *Mellor* v. *Tomkinson* (*ante*, p. 57) was cited.

Also reported (1899) 1 Q. B. 773; 68 L. J. Q. B. 470; 80 L. T. 317; 47 W. R. 500.

Machinery and plant are the two things or articles that may be a factory

within the meaning of the Act. All other factories are premises or places. Compare *Hall* v. *Snowden* (*ante*, p. 73).

It has been suggested that no appeal lies to the House of Lords, because an appeal does not lie from an award of an arbitrator. The Act, however, has provided for an appeal from the arbitrator to the Court of Appeal (sched. II. 4), and there appears to be no reason why the Appellate Jurisdiction Acts do not apply. See 38 & 39 Vict. c. 59, and 50 & 51 Vict. c. 70; Annual Practice, 1899, pt. ii. p. 477.

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## SIMMONS *v.* WHITE BROTHERS.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 263.

*Dependent.*—SECT. 7, 2.

The expression "dependent" in section 7, 2, means dependent for the ordinary necessaries of life for a person of that class and position in life, taking into account the financial and social position of the recipient. Deriving benefit from earnings is not necessarily being dependent upon them.

Whether a person is or is not dependent on a workman's earnings is a question of fact.

THIS was an appeal by the employers from the decision of the Judge of the Dartford County Court. The claim to compensation was made by the father and mother of a boy of the age of 14, who had been killed while engaged in shunting trucks at the appellants' works. The question was whether the father and mother were "dependents" within the meaning of para. 1 of the first schedule to the Workmen's Compensation Act, 1897. By section 7 (2) of the Act "'dependents' means, in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death." The father said in his evidence that his son had been at work about five weeks, earning 17*s.* a week, and that he used to

bring home his wages, and that they, his father and mother, took them in the same way as other parents did, and gave him what they thought right as pocket money; the boy's wages were a help towards maintaining the family. The County Court Judge thought that the boy's wages went into a common fund for the benefit of the family, and that they were sufficient to pay for his keep and leave a balance, and he found that upon the facts the parties were in part dependent upon the deceased, and he made an award accordingly. The employers appealed.

Mr. *S. H. Leonard*, in support of the appeal, contended that the claimants had not shown themselves to be "dependents" within the meaning of the Act. The learned Judge had, so to speak, misdirected himself by assuming that "dependents" included all those persons who could take the benefit of Lord Campbell's Act. But that was not the right test. The expression was a new one, and a meaning must be given to it. The ordinary meaning of "dependent," according to the dictionaries, was "one who lives in subjection or at the discretion of another," "one subordinate, one at the discretion or disposal of another." In Shakespeare's *Cymbeline* the phrase occurred—

> "What! shalt thou expect
> To be depender on a thing that leans?"

It was not sufficient to show merely that the claimants derived some pecuniary advantage from the deceased; it was necessary to show that they had had to rely on him for some of the necessaries of life.

Mr. *Hawtin*, for the respondents, was not called upon to argue.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said it could not be said that there was no evidence on which the County Court Judge could find that the parties were in part dependent on the deceased.

LORD JUSTICE COLLINS was of the same opinion. He could

not say that the County Court Judge had misdirected himself. He found the following opinion as to the meaning of the word "dependent" in the book entitled "Accidents to Workmen," by Mr. Minton-Senhouse and Mr. Emery: "By the expression 'wholly or in part dependent' a wide latitude is given to the arbitrator. It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. 'Dependent' probably means dependent for the ordinary necessaries of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits, and be decided as a question of fact by the arbitrator." He would presume that the learned County Court Judge had read that passage and had adopted it.

LORD JUSTICE ROMER said he could not escape from the finding of the County Court Judge, though he might have arrived at another finding himself. He agreed with what was stated in the text-book from which Lord Justice Collins had read.

Solicitors: *Leonard & Pilditch for the appellants; Edward Clarke for the respondents.*

Also reported in (1899) 1 Q. B. 1005; 68 L. J. Q. B. 507; 80 L. T. 344; 47 W. R. 513. See *Davies* v. *Main Colliery Co.* (*post*, p. 92).

## DAVIES *v.* MAIN COLLIERY CO.

Before A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.

*The Times*, *June* 6, 1899.

*Part dependent.*—SECT. 7, 2.

A family consisted of father, mother, and six children, who together earned 52*s.* a week, of which the injured lad earned 8*s.*, and which was used by the parents as a common fund. There was evidence on which the arbitrator could find that the parents were partly dependent on the lad's wages.

THIS was an appeal from an award of the Judge of the Neath County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicants were the father and mother of William Davies, a boy of the age of 16, who had been in the service of the Main Colliery Company, and had met with his death in consequence of accidental injuries in the course of his employment. The only question was whether the applicants were in part dependent upon the earnings of the deceased at the time of his death within the meaning of the words of the first schedule to the Workmen's Compensation Act. The family consisted of the father and mother and six children, including the deceased. The father was a collier, and was earning 25*s.* a week wages. The eldest child, who was a daughter, was earning 12*s.* a week, the second, who was also a daughter, was earning 7*s.* 6*d.* a week, and the deceased was earning 8*s.* a week. The three youngest children were not earning anything, neither was the mother. The children who were earning wages gave them to their mother to put into a common fund. The County Court Judge found that the father was in part dependent on the earnings of the deceased, and made an award in his favour.

The employers appealed, and it was argued on their behalf that the words "dependent upon his earnings" in the schedule to the Act meant dependent for some of the ordinary necessaries of life. Here there was no evidence that the father was dependent on his son's earnings for any of the necessaries of life, and the County Court Judge was not justified in drawing such an inference. The case of *Simmons* v. *White Brothers* (*ante*, p. 89) was referred to.

Mr. *Ruegg*, Q.C., and Mr. *W. St. John Francis-Williams* appeared for the appellants; Mr. *Brynmor Jones*, Q.C., and Mr. *S. T. Evans*, for the respondents.

The COURT, without calling upon counsel for the respondents, dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, although this case had been heard before the decision in *Simmons* v. *White Brothers*, the learned County Court Judge had taken the same view of the words "dependent upon the earnings of the workman" as this Court had taken in that case. As pointed out in that case, unless there was no evidence on which the County Court Judge could find that the father was in part dependent upon the earnings of his son, the appeal must be dismissed. In his opinion there was some evidence of this. The father was earning 25*s.* a week, the eldest daughter 12*s.*, the second daughter 7*s.* 6*d.*, and the boy 8*s.* The money so earned went into a common fund, and he inferred that that fund was used for the purposes of the common household. He thought that this case was in its facts not distinguishable from *Simmons* v. *White Brothers*.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

## JONES *v.* OCEAN COAL COMPANY (LIMITED).

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 339.

*Earnings—Period of Calculation—Break in Employment.*—SCHED. I. 1.

If there has been a break in the employment, *e.g.* a strike during the previous twelve months, the period of calculation in assessing the average weekly earnings is the period of the new employment.

The test of whether there has been a break in the employment is whether the relationship of master and servant has been continuous or not; a mere interval in the time the contract of service or work is running is not sufficient.

THIS was an appeal from an award of the Judge of the Merthyr Tydvil County Court upon proceedings to assess compensation under the Workmen's Compensation Act, 1897. The question arose as to the period during which the average weekly earnings of a workman were to be calculated so as to arrive at the amount of compensation payable to the workman. The question arose in consequence of the South Wales coal strike and lock-out in 1898, and it was said that a number of other cases depended upon it. The facts, which were agreed upon, were as follows: The appellant, Thomas Jones, was in the employment of the respondents, the Ocean Coal Company (Limited), on the date of the accident (October 3, 1898), by which he was injured, and the accident arose out of and in the course of his employment. The appellant had for some months prior to March 31, 1898, including the month of October, 1897, worked under the respondents under an agreement dated January 1, 1892. This employment was terminated by six months' notice given by the men under a clause to that effect in the agreement, and the individual contracts between the employers and the workmen were

terminated by notice given by the employers under another clause in the agreement, which notice expired on March 31, 1898. The South Wales strike or lock-out then intervened and lasted from April 1, 1898, to September 5, 1898. The appellant resumed employment with the respondents under a new contract on September 12, 1898, containing different terms from the former contract. The County Court Judge took the time at the beginning of the twelve months preceding October 3, 1898, the date of the accident, during which the appellant was at work with the respondents, and the time at the end of the twelve months after the strike was over, during which he was at work for them, and divided the total earnings during that time by the number of weeks the appellant was at work, and awarded compensation at 8*s.* 6*d.* a week. The appellant contended that the period of employment should be taken from September 12 to October 3, 1898, and upon that footing the compensation payable would be 15*s.* 9*d.* a week. By Schedule I., para. 1, of the Workmen's Compensation Act, 1897, the amount of compensation shall be "(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1."

Mr. *Cripps*, Q.C., and Mr. *W. D. Benson*, for the appellant, contended that the period of employment, whether it was for twelve months or for a less time, must be continuous. Here the former employment of the appellant was terminated when the strike took place, and a new contract of employment was entered into on September 12 on new terms. There was not a mere break in the employment, as, for example, by a man taking a holiday, as in *Keast* v. *Barrow Hæmatite Steel Company* (*post*, p. 99).

They also referred to *Price* v. *Marsden* (*post*, p. 108).

Mr. *Ruegg*, Q.C., and Mr. *Arthur Lewis*, for the respondents,

contended that, as the appellant was in the same employment both before and after the strike, the two periods within the year preceding the date of the accident must be added together to ascertain the average weekly earnings. The Act did not intend that the average weekly earnings should be calculated upon a short period of exceptional earnings. The County Court Judge was therefore right.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the question raised a short point upon Schedule I., para. 1 (*b*), of the Act of 1897. Prior to March 31, 1898, the appellant had been in the service of the respondents under the terms of an agreement dated January 1, 1892. The Judge had found as a fact that that agreement was terminated by six months' notice given by the man, and the individual contracts between the employers and the workmen were terminated by notice given by the employers expiring on March 31, 1898. In face of that finding they could not hold that there had been a continuous employment from October 3, 1897, to October 3, 1898, when the accident happened. When the appellant went out on strike on April 1, 1898, he need never have come back to the same employers again, and might have obtained employment anywhere else he pleased. The employment was therefore terminated on March 31. The appellant remained out on strike until the following September, when he came back to work again with his former employers upon a new contract containing new terms. The accident to him occurred a few weeks later, on October 3. The question was, upon what basis was the compensation to be assessed? That depended upon the true construction of Schedule I., para. 1 (*b*), of the Act. The first part of that paragraph made the compensation depend upon the average weekly earnings during the twelve months previous to the accident, if the workman had been so long employed. In his opinion that meant continuous employment during the twelve months. The second limb of the paragraph dealt with a period less than twelve months during which the workman had been in the

employment of the same employer. In his opinion, that also meant a continuous employment. In this case that period was from September 12 to October 3, 1898, the date of the accident, and the average weekly earnings must be taken during that period. The contention of the appellant was therefore right.

LORD JUSTICE VAUGHAN WILLIAMS agreed. Upon the general construction of the Act he had some hesitation, as the Act was a most difficult one to construe. Until those sittings he had not been called upon to construe the Act, and that made him diffident about appearing to take a view of it which might be different from that taken by *Lord Justice A. L. Smith,* who had taken part in every decision upon the Act since it came into operation; and, moreover, he would be very sorry that there should be any break in the continuity of those decisions. In his opinion, however, the facts of the present case left them in no difficulty in deciding this case. As he understood the facts, the agreements of January 1, 1892, and of September 1, 1898, contained the general terms of employment agreed to between the masters and men, such as the rate of wages, which were to continue in force subject to six months' notice. He did not understand that that governed the actual employment, as the workmen were, he understood, employed on a weekly or monthly employment. However that might be, there was a time during the twelve months between October 3, 1897, and October 3, 1898, when the appellant did not choose to work for the respondents, and his employment came to an end. After the strike was over the appellant came back and entered again into the respondents' employment under a new contract of employment. The meaning of Schedule I., para. 1 (*b*), of the Act of 1897 was, in his opinion, that the employment must be continuous with the same employer, whether for the twelve months or for the less period therein referred to. The employment need not be continuous without any break in time. The question was whether substantially the relation of master and servant existed during the whole of the period. If work were so slack that the master could only give the workman three

days' work in the week, it would still be true to say that the relation of master and servant existed during the whole period, and that, therefore, the employment continued during the whole period. The test whether the relation of master and servant was broken was, in his opinion, whether the master would give the servant work which he had to give, and the servant would accept it. The present was not a case where there was no work to do, but the relation of master and servant ceased to exist because the respondents were not willing to employ the appellant, and the appellant was not willing to work. In his opinion, therefore, the employment subsequent to the strike was the factor to be taken into account in assessing the compensation.

LORD JUSTICE ROMER agreed. The employment referred to in Schedule I., para. 1 (*b*), must be a substantially consecutive or continuous employment by the same employer. If at the commencement of the twelve months the workman had been in the employment of a master for two months, and had then gone into the employment of another master for three months, and had then come back into the employment of his old master and finished the twelve months in his employment, that would not be a continuous employment for the twelve months. So also with regard to the less period, that meant a less period during which the workman had been substantially in the continuous employment of the same employer up to the time of the accident. The Act used the word "period" in the singular, and in his opinion a former period of employment could not be added to the later period, there having been a termination of the former employment. The word "substantially" was important, because if holidays intervened the employment would nevertheless be substantially continuous. If, as Lord Justice Vaughan Williams put it, the workman could not get continuous work from his employer, though willing to work, his Lordship would not let that circumstance weigh with him. In the present case the appellant was in no sense during the strike in the employment of the respondents.

The COURT accordingly amended the award by inserting 15*s.* 9*d.* per week instead of 8*s.* 6*d.*

Solicitors: *Riddell, Vaizey, & Smith, for Walter Morgan, Pontypridd, for appellant; W. V. L. Simons, Pontypridd, for respondents.*

Also reported (1899) 2 Q. B. 124; 68 L. J. Q. B. 731; 80 L. T. 582; 47 W. R. 484.

See *Keast* v. *Barrow Haematite Co.* (*infra*); *Appleby* v. *Horseley Co.* (*post*, p. 103); *Price* v. *Marsden* (*post*, p. 108); *Jones* v. *Walker* (*post*, p. 142).

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## KEAST *v.* THE BARROW HAEMATITE STEEL COMPANY.

Before A. L. SMITH, CHITTY, and COLLINS, L.JJ.

(1899.) 15 *T. L. R.* 141.

*Average Weekly Earnings—Intervals of Employment.*—SCHED. I. 1.

Intervals from work not amounting to a break in the employment should not be excluded in calculating average weekly earnings. If a man has been employed for twelve months, but has taken odd weeks off, the total amount of his earnings should be divided by 52 in order to calculate his average weekly earnings.

THIS was an appeal from an award of the Judge of the Lancashire County Court in an arbitration under the Workmen's Compensation Act, 1897. The claim to compensation was made by J. Keast, a workman, against his employers, the Barrow Haematite Steel Company. The County Court Judge made an award in favour of the workman, and this appeal was brought by the company. The only question in the appeal was as to the meaning of the words "average weekly earnings," in the first schedule to the Act. By para. 1 of that schedule, "The amount of compensation under this

Act shall be—(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

Mr. *C. A. Cripps*, Q.C. (Mr. *A. G. Steel* with him), appealed for the company, and contended that the true method of arriving at the "average weekly earnings," within the meaning of the schedule, was to take the total amount the man had earned during the previous twelve months—that was to say, if he had been so long employed—and divide that amount by 52, the number of weeks in the year. In the present case the workman had been employed for sixteen years, and during the last year his earnings had amounted to £70 7*s.* 9*d.* That sum divided by 52 gave £1 7*s.* The proper compensation in this case, therefore, was a weekly payment of 50 per cent. of £1 7*s.*—that was to say, of 13*s.* 6*d.* The contention on the part of the claimant was that, in making the calculation, those weeks or days in weeks during which the workman had not been actually employed ought to be excluded, and that, therefore, where he had not been working continuously throughout the whole year, the divisor ought not to be 52, but some lower number. To take an illustration—Suppose a man during a series of weeks worked only for two days a week, and earned 5*s.* each day. The argument of the claimant was that his average weekly earnings would be 30*s.* No doubt many people who had not too much work to do would like to have their weekly earnings so calculated; but the real truth was that, in such a case, the average weekly earnings would be 10*s.* In this case the claimant sought to exclude certain periods during which he was not actually working, and to divide the total of £70 7*s.* 9*d.* by a lower figure than 52, and so made out his average weekly earnings to be £1 9*s.*, and he claimed a weekly payment of half that

—viz. 14*s.* 6*d.* The peculiarity of the case was that when the County Court Judge delivered his judgment he was understood to be deciding in favour of the company. He said that if sick time or time off was not to be considered, the result would be that the workman would get more compensation when he was off work than he would when he was working. The claimant, thinking the decision to be against him, gave notice of appeal, but it was pointed out by the Registrar that the Judge had really decided in his favour, and when the award was looked at it appeared that the Judge ordered the company to pay as compensation a weekly sum of 14*s.* 6*d.* Thereupon the company, the formal order being against them, brought this appeal. The real question in the appeal was whether the view of the company or the view of the claimant as to the meaning of the words "average weekly earnings" was correct. According to the construction put on the words by the claimant, the less the number of days a workman actually worked, the greater would be the amount of his compensation. The company's construction, on the other hand, gave the words their natural meaning, and did not lead to any such absurd result.

Mr. *Pickford*, Q.C. (Mr. *T. S. Little* with him), appeared for the workman, and said that the County Court Judge, in making the calculation, had rightly taken into consideration the fact that the man had been away from work during certain periods of the year. He had been twice away for a week or more, and twice for a shorter period. There were thus intervals which made a break in his employment. By the schedule the average during the 12 months was only to be considered if he had been so long continuously employed. The last break ended only a fortnight before the accident. It ought to be inferred that the County Court Judge found as a fact that there had been a break in the employment, and decided the case under the latter part of the subsection in the schedule.

The Court allowed the appeal.

Lord Justice A. L. Smith repeated what he had said on

previous occasions—viz. that, in cases under the Workmen's Compensation Act, appeals could only be brought to this Court on questions of law. The County Court Judge had decided the case on the construction of the words "average weekly earnings." It was clear that the point now taken by Mr. Pickford, as to there having been a break in the employment, was not before the County Court Judge, and there was no ground for saying that he had dealt with the case on the footing of there having been such a break. He expressly spoke of taking the earnings from August 24 to August 24, that being the date of the accident. He took the earnings of the whole twelve months, as if the man had been in employment all that time, and he thought that, if the man had worked every day, it would have been right to divide by 52; but he saw that there were some days on which the man did not work, and he took those days and counted them in weeks and subtracted that number of weeks from 52, and divided by the difference. That was the judgment of the County Court Judge, and in his opinion it was wrong. The total amount of the year's earnings ought to have been divided by 52, and not by any less number excluding the weeks when the man was not at work. The appeal therefore succeeded.

LORDS JUSTICES CHITTY and COLLINS delivered judgment to the same effect.

Solicitors: *Peace & Ellis for the Company; Edward Atter for the workman.*

Also reported in 63 J. P. 56.

See *Jones* v. *Ocean Coal Co.* (*ante*, p. 94); *Appleby* v. *Horseley Co.* (*post*, p. 103); *Price* v. *Marsden* (*post*, p. 108); *Jones* v. *Walker* (*post*, p. 142).

# APPLEBY *v.* THE HORSELEY COMPANY (LIMITED) & LOVATT—SAME *v.* SAME.

Before A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.

(1899.) 15 *L. T. R.* 410.

No. I.—*Earnings—Break in Employment—Period of Calculation.*—SCHED. I. 1.

No. II.—*Indemnity—Notice of Intention to Claim.*—SECT. 4—W. C. R., 1898, RR. 19–23.

*No. I.*—Where there is a break in the employment which amounts to a determination of the old employment, the period over which the average weekly earnings should be assessed is that immediately preceding the injury.

*No. II.*—Where indemnity is claimed by one respondent against another, notice of intention to claim is imperative.

THESE were two appeals from the decision of the Judge of the Leicester County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicants were the widow and children of a workman who had been killed by an accident in the course of his employment. The employers of the workman were the Horseley Company (Limited), and the work which they had undertaken, and on which the workman was engaged at the time of the accident, was bridge work and iron work in connection with alterations which were being carried out at Leicester Railway Station. The work of carrying out the alterations as a whole had been undertaken by Henry Lovatt, and the Horseley Company had entered into a sub-contract with him for the bridge work and iron work. The workman had originally been in the employment of the company as a riveter, earning wages at the rate of £2 10*s.* a week. But in March, 1896, he met with an accident, in consequence of which he was unable to do any work for eleven months, but he was not dismissed

from the service of his employers. In February, 1897, he commenced work again, but he was then employed as a timekeeper and storekeeper, earning wages at the rate of 30*s.* a week. He continued to work in this sort of employment till his death in consequence of the accident now in question, which happened on September 27, 1898. The County Court Judge made an award in favour of the applicants, assessing the compensation at £269. The first appeal was brought by the Horseley Company, and the question in that appeal was as to the amount of compensation to which the applicants were entitled under the Workmen's Compensation Act. The applicants were wholly dependent upon the earnings of the deceased at the time of his death. By the first schedule to the Act, para. 1 (*a*) (*i*), "The amount of compensation under this Act shall be, where death results from the injury, if the workman leaves any dependents wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, . . . and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

Mr. *McCardie* appeared for the Horseley Company, and contended that there had been no break in the employment of the deceased, and that the first part of para. 1 (*a*) (*i*) of the first schedule applied. Strictly speaking, therefore, the compensation ought to be assessed at the amount of the actual earnings received by the workman during the three years preceding September 27, 1898, which was £177. The employers were, however, willing, in order to give the applicants a somewhat larger sum, to treat the case as coming within the second part of that subparagraph, and to take as the basis of the compensation the average weekly earnings of the deceased during the period from February, 1897, to the date of his death—viz. 30*s.*—and multiply that by 156,

which gave £234. The County Court Judge found as a fact that there had been a break of eleven months in the employment of the deceased, and that he entered upon a new employment in February, 1897, and he took the period before that break, while the deceased was earning £2 10*s.* a week, and the period after the break, while the deceased was earning 30*s.* a week, and calculated the average weekly earnings of those two periods added together, and multiplied that average by 156, which gave £269. If there was a break in the employment, the County Court Judge was not entitled to take into consideration the period before that break. The County Court Judge was in error in construing the words "the period of his actual employment" at the end of the subparagraph as meaning periods of actual employment.

Mr. *McCurdy*, for the applicants, contended that a distinction ought to be drawn between the expressions "employment" and "actual employment" as used in the subparagraph. "Employment" meant the relationship of master and servant. "Actual employment" meant actual services. In this case there had been a continuous employment for three years, but the period of actual employment had been less than three years by reason of the break of eleven months. The County Court Judge was justified in basing his calculation on the average weekly earnings of the deceased "during the period of his actual employment," which meant during the time that he was actually at work, and in bringing into account the earlier period of work, because the relationship of master and servant had continued throughout. The case of *Keast* v. *Barrow Haematite Steel Company* (*ante*, p. 99) was referred to.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion there had been a break of eleven months in the employment of the deceased man. He had met with an accident in March, 1896, and was away till February, 1897, when he asked his employers to take him on to work again. They did not give him the same work as he had before, but employed him

in a different capacity and at different wages. The question was how, under those circumstances, compensation was to be assessed. He thought that throughout the subparagraph by which the case was governed—viz. para. 1 (*a*) (*i*) of the first schedule to the Workmen's Compensation Act—the word "employment" ought to be read as meaning continuous employment. Where the period of continuous employment was less than three years, as it was in this case, the amount of compensation was to be 156 times the average weekly earnings of the workman during the period when he was in fact continuously employed. Here he was continuously employed from February, 1897, to the time of his death in September, 1898. The amount of the award, therefore, ought to be £234, and not £269. In his opinion the County Court Judge was wrong in reading the word "period" as meaning "periods."

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

The second appeal was also brought by the Horseley Company, Henry Lovatt being the respondent thereto, and was against an order contained in the award of the County Court Judge by which, in pursuance of section 4 of the Act, he ordered the Horseley Company to indemnify Henry Lovatt against liability to pay the compensation and costs directed to be paid by the award. This order was asked for on Lovatt's behalf at the hearing of the arbitration, no notice of intention to claim such indemnity having been previously given to the Horseley Company.

Mr. *McCardie* argued that an order for indemnity under section 4 could not be made without notice. By rule 19 of the Workmen's Compensation Rules, 1898, "Where a respondent claims to be entitled under section 4 or section 6 of the Act or otherwise to indemnity over against any person not a party to the arbitration, he shall, five clear days before the day fixed for proceeding with the arbitration, file a notice of his claim." By rule 23 (1), "Where a respondent claims to be entitled to indemnity against any other respondent, a like notice may be issued and the like procedure may be

adopted for the determination of questions between the respondents as might be issued and adopted if such last-mentioned respondent were a third party. (2) Provided that where both the undertakers as defined by the Act and a contractor with them are made respondents to an arbitration, and it is decided in such arbitration that the contractor is liable to pay compensation under the Act, the Judge may, without any consent or admission of liability on the part of such contractor, make an award . . . in favour of the undertakers against the contractor." Rules 19–23 provided a code of procedure as to claims for indemnity, and the County Court Judge had no power to make an order for indemnity in a case where the provisions of the code were not complied with.

Mr. *T. W. Chitty*, who appeared for Lovatt, contended that, though, where a respondent claimed indemnity against a person not a party to the arbitration, notice was required, it was not necessary where the person asking for indemnity, and the person from whom indemnity was sought, were the undertaker and contractor who were already before the County Court Judge as respondents to the arbitration. Rule 19 used the word "shall," rule 23 used the word "may."

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, on the true construction of the rules, it was necessary to give notice of intention to claim indemnity.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

Solicitors: *B. Wilkinson, agent for S. R. White, Leicester, for the applicants; Morgan, Price, & Mewburn, agents for Hargreave & Heaton, Birmingham, for the Horseley Co.; Pritchard, Englefield, & Co. for Lovatt.*

*No. I.*—Also reported (1899) 2 L. B. 521; 68 L. J. Q. B. 892; 80 L. T. 853.

*No. II.*—Also reported (1899) 2 L. B. 521; 68 L. J. Q. B. 894; 80 L. T. 855.

*No. I.*—See *Jones* v. *Ocean Coal Co.* (*ante*, p. 94); *Keast* v. *Barrow Haematite Co.* (*ante*, p. 99); *Price* v. *Marsden* (*post*, p. 108); *Jones* v. *Walker* (*post*, p. 142).

## PRICE *v.* MARSDEN & SONS.

Before A. L. SMITH, CHITTY, and COLLINS, L.JJ.

(1899.) 15 *T. L. R.* 184.

*Average Weekly Earnings—Period of Employment—Change of Character of Employment and Rate of Wages.*—SCHED. I. 1.

The period of employment for assessing average weekly earnings is not affected by a change in the character of the employment and a consequent change in the rate of wages. When during employment for twelve months there has been a change in the rate of wages, the average must be taken on the earnings for the whole twelve months, and not on the earnings at the time of the accident.

THIS was an appeal by a workman from an award of the Judge of the Bolton County Court. The appellant, at the time when he sustained the injury in respect of which he claimed compensation, had been in the employment of the respondents as a factory hand for three years. Up to September 9, 1898, he was a little-piecer, earning 9*s.* 6*d.* a week. On that date he was promoted to be a side-piecer at 13*s.* 8*d.* a week. The accident happened on September 28, 1898. The only question in the case was as to the amount of compensation to which the appellant was entitled. The first schedule to the Workmen's Compensation Act, para. 1 (*b*), provides that the compensation under the Act where total or partial incapacity for work results from the injury, shall be "a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed; but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1." The County Court

Judge took 49 weeks at 9*s.* 6*d.* . . and three weeks at 13*s.* 8*d.*, and divided the total by 52, and awarded a weekly payment of 50 per cent. of that amount. It was now contended on the part of the appellant that the words in the schedule, "if he has been so long employed," ought to be construed as meaning "if he has been so long employed in the same kind of employment." Here the appellant entered into a new kind of employment on September 9. This case was governed by the last part of the subparagraph, and the award ought to have been for a weekly payment of 6*s.* 10*d.*

Mr. *Clarke Hall* appeared for the appellant; Mr. *Loehnis* for the respondents.

The COURT, without calling upon counsel for the respondents, dismissed the appeal.

LORD JUSTICE A. L. SMITH said the County Court Judge had taken the right view of the matter. The words "if he has been so long employed" in para. 1 (*b*) of the first schedule to the Act meant "if he has been so long employed by the same employer," and not "if he has been so long in the same grade of employment."

LORDS JUSTICES CHITTY and COLLINS concurred.

Solicitors: *Chester, Broome, & Griffithes for the appellant; Rowcliffes, Rawle, & Co., agents for Hall & Son, Bury, for the respondents.*

Also reported in (1899) 1 Q. B. 493; 68 L. J. Q. B. 307; 80 L. T. 15; 47 W. R. 274.

See *Jones* v. *Ocean Coal Co.* (*ante*, p. 94); *Keast* v. *Barrow Haematite Co.* (*ante*, p. 99); *Appleby* v. *Horseley Co.* (*ante*, p. 103); *Jones* v. *Walker* (*post*, p. 142).

## MOUNTAIN *v.* PARR.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1899.) 15 *T. L. R.* 262.

*Arbitration—Rehearing—County Court Judge.*

A County Court Judge sits as arbitrator, and not as a Judge.

An arbitrator has no power to grant a rehearing in the nature of a new trial of an action after he has made his award.

THIS was an appeal from a decision of the Judge of the Nottingham County Court. The hearing of the workman's claim to compensation in this case took place on November 15, 1898, before the County Court Judge sitting as an arbitrator under the Act, and an award was made in favour of the workman. On December 10 the employers gave notice of their intention to apply to the County Court Judge for a new trial. On the hearing of such application, on December 21, it was objected on the part of the workman that the County Court Judge had no jurisdiction to entertain the question of a new trial. The County Court Judge thought that he had jurisdiction to entertain the application, but in the result he refused to allow a new trial. The employers appealed to the Court of Appeal.

Mr. *Etherington Smith,* who appeared for the workman, took a preliminary objection. The appeal was in effect an appeal from the decision of the County Court Judge on the application for a new trial. But the Judge had no jurisdiction to hear that application, and therefore no appeal lay from his refusal to grant a new trial. Neither could the employers now appeal from the decision of the County Court Judge on the hearing of the arbitration, for they failed to give notice of appeal within 21 days, and were therefore out of time. As to the first point, para. 4 of the second

schedule to the Workmen's Compensation Act provided as follows: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the County Court Judge, and the decision of the Judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time, and in accordance with the conditions prescribed by rules of the Supreme Court, either party appeals to the Court of Appeal." The time for bringing an appeal from a County Court was prescribed by Order LIX. rule 12, of the rules of the Supreme Court to be 21 days. A person who desired to appeal in a case under the Workmen's Compensation Act could only do so under para. 4 of the second schedule, and the only appeal which that paragraph allowed was an appeal on a point of law which had been decided by the County Court Judge at the hearing of the arbitration, in a case where the County Court Judge sat to hear the case as an arbitrator. Here the appellants sought to appeal on a question of law which arose on the application for a new trial—viz. whether a certain man was in a position to give orders to the workman who was injured. The rules made under the Act entitled the "Workmen's Compensation Rules, 1898," contained no provisions as to granting new trials. The learned Judge erroneously thought that jurisdiction was conferred on him to entertain an application for a new trial by rule 64, which enacted that "where any matter or thing is not specially provided for under these rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act." There was no power of reviewing a case under the Workmen's Compensation Act other than that given by para. 4 of the second schedule, with the single exception of the power given to the County Court Judge by para. 12 of the first schedule to review the amount of any weekly payment

which had been ordered to be paid under the Act. As to the other point, the appellants had given no notice of appeal within 21 days of the original hearing. The notice which they did give, of intention to apply for a new trial, was given more than 21 days after the hearing.

Mr. *W. H. Stevenson*, for the employers, contended that the provisions of the Act and the rules showed that an arbitration under the Act was intended to be an action in all but name. Para. 2 of the second schedule provided for the arbitration being settled, in the absence of agreement, by the County Court Judge. Rule 1, para. 4, of the rules incorporated the County Court rules. Rule 24 said that the procedure in an arbitration should be the same as the procedure in an action in the County Court. Part of the procedure of an action in the County Court was the procedure relating to an application for a new trial. He also relied on rule 64. The County Court, therefore, had jurisdiction to entertain the application for a new trial, and an appeal lay from his refusal.

The COURT allowed the objection, and dismissed the appeal.

LORD JUSTICE A. L. SMITH said he thought the point taken on behalf of the workman was a good point. The question was whether the County Court Judge had jurisdiction to entertain an application for a new trial. It was plain that the County Court Judge at the original hearing was sitting as an arbitrator, and as an arbitrator only. Section 1, subsection 3, of the Workmen's Compensation Act, said that if any question arose in any proceedings under the Act as to the liability to pay compensation under the Act (including any question as to whether the employment was one to which the Act applied), or as to the amount or duration of compensation under the Act, the question, if not settled by agreement, should, subject to the provisions of the first schedule to the Act, be settled by arbitration in accordance with the second schedule to the Act. The first schedule dealt with the scale and conditions of compensation. And

in passing he might refer to para. 12 of that schedule, by which the arbitrator had jurisdiction to review any weekly payment. Then the second schedule was headed "Arbitration." Para. 2 said that in the absence of agreement the matter should be settled by the County Court Judge. Para. 4 provided that the Arbitration Act was not to apply, but the arbitrator might submit any question of law for the decision of the County Court Judge, and the decision of the Judge on any question of law, either on such submission, or in any case where he himself settled the matter, should be final, unless either party appealed within the prescribed time; and the County Court Judge should for the purpose of the arbitration have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the County Court. Obviously the meaning of the enactment was that a County Court Judge sitting to hear a case under this Act sat as an arbitrator. Now could an arbitrator grant a new trial of a case which he had heard? Clearly he had no power to do so. It was argued that rules 24 and 64 gave the Judge the same powers as if he were sitting not as an arbitrator. In his opinion those rules were intended to apply the powers to which they referred as far as they were applicable to arbitrators, and no further. The County Court Judge, therefore, had no power to grant a new trial, or to entertain an application for that purpose.

LORDS JUSTICES COLLINS and ROMER concurred.

Mr. *W. H. Stevenson* asked the Court to extend the time for appealing from the original decision of the County Court Judge.

The COURT refused to extend the time.

Solicitors: *J. H. Lee & Watts, for Whittingham & Williams, Nottingham, for the workman; Bramwell, White, & Saunders, for Walker & Barker, Nottingham, for the employers.*

Also reported in (1899) 1 Q. B. 805; 68 L. J. Q. B. 447; 80 L. T. 342; 47 W. R. 353.

## HALL *v.* SNOWDEN, HUBBARD, & CO.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

(1889.) 15 *T. L. R.* 244.

*Appeal—Security for Costs.*—R. S. C., 1883, OR. 58, RR. 15 AND 20.

The ordinary rules of the Court of Appeal as to security for costs of the appeal apply to appeals from the County Court.

THIS was an application by the respondents, Messrs. Snowden, Hubbard, & Co., that the appellant should be ordered to give security for the costs of an appeal from the Bloomsbury County Court under the Workmen's Compensation Act, 1897.

Mr. *C. Herbert Smith*, for the respondents, said that the claim for compensation under the Act was by the deceased workman's infant child suing by a next friend. The case raised the question whether the wharf where the deceased workman was killed was a "factory" within the meaning of the Workmen's Compensation Act, 1897. The County Court Judge gave judgment for the respondents, and upon representations made to them as to the claimant's poverty the respondents did not ask for costs in the County Court. The respondents, however, now asked for security for the costs of the appeal, the affidavits showing that the appellant would, on account of poverty, be unable to pay the costs of the appeal if the appeal were unsuccessful.

Mr. *Bailhache*, for the appellant, said that the Court last week made an order for security for the costs of an appeal under the Workmen's Compensation Act, 1897, because it was shown that the appellant was backed by a trade union, who were fighting the case. Here the appellant, who was admittedly in poor circumstances, was herself fighting the case on behalf of the infant, and if the Court held that mere poverty was a ground for ordering security for costs of an

appeal, then in nearly every case security for costs would be ordered, and many working men, unless they belonged to a trade union, or their dependents, would be debarred from appealing by having an order for security for costs made against them. Under the Employers' Liability Act, 1880, the appeal from the County Court went to the Divisional Court, and no order for security for the costs of the appeal to that Court could be ordered. Under the Act of 1897 the appeal came to the Court of Appeal direct, and if orders for security for costs were to be made, the claimant could very seldom obtain a decision of the Supreme Court upon what might be very important questions of law. The question in the present case was whether a wharf on which there was no machinery was a "factory" within the Act of 1897, and this was a most important question, as there were hundreds of such wharves in London alone. The Court had a discretion to order security for the costs of the appeal, but in such a case as this the balance of convenience was in favour of refusing to make an order for security. Mere poverty in such cases was not a special circumstance upon which the Court would order security. [LORD JUSTICE A. L. SMITH: Why cannot you appeal *in forma pauperis?* That would get rid of any difficulty, because I feel that in these cases we may be shutting out a workman from appealing by ordering security for the costs of appeal. On the other hand, there is no rule saying that security for costs must not be given in these cases.] The respondents would be no better off if the appellant appealed *in forma pauperis.* He submitted that the Court would not order security for the costs of the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, an order must be made for security for the costs of the appeal. The reasons why he came to that conclusion were these: The Legislature had enacted that the tribunal to try questions of compensation under the Workmen's Compensation Act, 1897, was the County Court. An appeal upon a question of law was given to this Court. The Legislature had in no way enacted that the ordinary rule of practice of this Court as to

ordering security for the costs of an appeal should be abrogated in such cases. The ordinary rule of the Court was that, except in applications for new trials, whenever the respondent could show that the appellant was a person from whom the respondent would be unable to get the costs of the appeal, if the appeal was unsuccessful, the Court would order security for the costs of the appeal. It was clear that the appellant in the present case would be unable to pay to the respondents their costs of the appeal if the appeal was unsuccessful, and therefore, in his opinion, in this and similar cases an order for security for costs would be made. If the appellant was in a position to obtain an order for leave to appeal *in forma pauperis*, she need not give security for the costs of the appeal; but in such a case the appellant must first obtain the opinion of counsel that she had a proper case for an appeal. The appellant must give security to the amount of £15.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Solicitors: *Riddell, Vaizey, & Smith for appellants; Marshall & Pridham for respondents.*

Also reported in (1899) 1 Q. B. 593; 68 L. J. Q. B. 363; 80 L. T. 256; 47 W. R. 486.

See next succeeding cases.

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## McLAUGHLIN *v.* CLAYTON.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

*The Times, February* 28, 1899.

*Security for Costs of Appeal—Trade Union.*—R. S. C., 1883, OR. 58, RR. 15 AND 20.

The fact that a case is being run by a trade union does not affect the question of security for costs of appeal.

THIS was an application by the respondents for security for costs of the applicant's appeal from an award under the

Workmen's Compensation Act. It appeared that the proceedings were being conducted on behalf of the applicant by a trade union.

Mr. *Ashton* appeared for the employers, the respondents, in support of the application; Mr. *T. W. Chitty* for the workman, the appellant.

The COURT ordered security to the amount of £15.

See succeeding cases, and *Hall* v. *Snowden* (*ante*, p. 114).

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## HADDOCK *v.* HUMPHREYS AND ANOTHER.

Before A. L. SMITH and VAUGHAN WILLIAMS, L.JJ.

*The Times, August* 1, 1899.

*Security for Costs of Appeal.*—R. S. C., 1883, OR. 58, RR. 15 AND 20.

Security for costs of appeal may be ordered, although the costs of the arbitration have been paid by a trades union.

THIS was an application for security for the costs of an appeal under the Workmen's Compensation Act, 1897, from the decision of Judge Shand, the Judge of the Liverpool County Court.

Mr. *F. Broadbridge*, for the respondents, Messrs. W. and T. Humphreys, said that the appellant was the widow of a workman who was killed by an accident, and the application for security for costs was made upon the ground of the appellant's poverty. The Carters' Union had taken up her case in the County Court.

Mr. *J. K. F. Cleave*, for the appellant, said that the costs in the County Court had been paid, and in these circumstances the Court ought not to order security for the costs of the appeal.

LORD JUSTICE A. L. SMITH: The fact that the union had

paid the costs in the County Court is no ground for supposing that they will pay them in the Court of Appeal. The appellant must give security to the amount of £15.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

See *Hall* v. *Snowden* (*ante*, p. 114).

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## REES *v.* RICHARDS.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

*The Times, August* 8, 1899.

*Security for Costs of Appeal.*—R. S. C., 1883, OR. 58, RR. 15 AND 20.

Security for the costs of appeal may be ordered where the appellant, though poor, is not able to make the affidavit required for appeals *in forma pauperis.*

THIS was an application by the respondent, the employer, for an order for security for the costs of an appeal under the Workmen's Compensation Act, 1897.

Mr. *R. B. D. Acland,* for the respondent, said that the application was made upon the ground of the appellant's want of means. He received a salary of 20*s.* a week.

Mr. *Bailhache,* for the appellant, said that the appellant, though a poor man, was not in a position to make an affidavit bringing himself within the rules for the purpose of appealing *in forma pauperis.* This was a ground for refusing to order security for the costs of the appeal.

The COURT, however, ordered security for costs to the amount of £15.

See *Hall* v. *Snowden* (*ante*, p. 114).

## SKEGGS *v.* KEEN.

Before LINDLEY, M.R., and RIGBY, L.JJ.

*The Times, May* 16, 1899.

*Security for Costs of Appeal.*—R. S. C., 1883, OR. 58, RR. 15 AND 20.

Security for costs will not be ordered where the poverty of the appellant is due to the accident, and the affidavit required for leave to appeal *in forma pauperis* cannot be made.

THIS was an application by an employer for security for the costs of an appeal by a workman against an award in an action brought by him under the above Act against the employer for compensation in respect of injuries to him by an accident. The plaintiff is a working engineer, and his wages were 32*s.* a week, and the ground of the application was that he would not be able, if unsuccessful, to pay the costs of the appeal.

Mr. *Ellis Hill* was for the employer.

The COURT refused to order security to be given, on the ground that the circumstances were very special. The plaintiff was not in a position to make the affidavit required to entitle him to sue *in forma pauperis*, and his poverty was caused by the accident. The Court had a discretion in the matter, and under the circumstances it would not be just to order security to be given. No order would be made upon the application.

See *Hall* v. *Snowden* (*ante*, p. 114).

## SILVESTER *v.* CUDE.

Before A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.

(1899.) 15 *T. L. R.* 434.

*Arbitration—Procedure—Evidence where no Answer.*—W. C. R., 1898, R. 17.

Where a respondent to an arbitration in the County Court, having failed to file an answer, desires to produce evidence which is not consented to by the applicant, "the Judge may, on such terms as he shall think fit, either proceed with the arbitration and allow the respondent to avail himself of such (evidence), or adjourn the arbitration to enable the respondent to file such answer."

*Obiter dicta per* A. L. SMITH, L.J., to which VAUGHAN WILLIAMS, L.J., did not agree, the Judge is not bound to take either of those courses.

THIS was an appeal by the employer from the award of the Judge of the Bow County Court in an arbitration under the Workmen's Compensation Act, 1897. The workman, who was a bricklayer's labourer, had sustained injuries by an accident in the course of his employment on or about a building. Particulars were duly annexed to the request for arbitration in accordance with Rule 9 of the Workmen's Compensation Rules, 1898, and copies of the particulars were duly served on the employer. The particulars, however, did not allege that the building exceeded 30 feet in height. The employer did not file any answer in accordance with Rule 17. At the hearing the employer proposed to give evidence to prove that the building did not exceed 30 feet in height when measured in the proper way as determined in the case of *Hoddinott* v. *Newton, Chambers, & Co.* (*ante*, p. 62). The County Court Judge refused to allow the employer to give such evidence, on the ground that he had failed to file an answer. Rule 17 provides as follows: "(1) If any respondent desires to disclaim any

interest in the subject-matter of the arbitration, or considers that the applicant's particulars are in any respect inaccurate or incomplete, or desires to bring any fact or document to the notice of the Judge, or intends to rely on the fact that notice of the accident was not served in accordance with section 2 of the Act, or that the claim for compensation was not made within the time limited by the said section, or intends to deny (wholly or partially) his liability to pay compensation under the Act, he shall, five clear days at least before the day fixed for proceeding with the arbitration, file with the Registrar an answer, stating his name and address, and the name and address of his solicitor (if any), and stating that he disclaims any interest in the subject-matter of the arbitration, or stating in what respect the particulars are inaccurate or incomplete, or stating concisely any fact or document which he desires to bring to the notice of the Judge, or on which he intends to rely, or the grounds on and extent to which he denies liability. (3) Subject to any answer so filed, and to the provisions of the next following paragraph, the applicant's particulars, and, in the case of a claim for compensation, the liability to pay compensation under the Act, shall be taken to be admitted. (4) Provided, that in case of non-compliance with this rule, and of the applicant's not consenting at the arbitration to permit a respondent to avail himself of any matter of which he should, pursuant to this rule, have given notice by filing an answer, the Judge may, on such terms as he shall think fit, either proceed with the arbitration and allow the respondent to avail himself of such matter, or adjourn the arbitration to enable the respondent to file such answer." In the result the County Court Judge made an award in favour of the applicant, fixing the compensation by consent at a lump sum of £6 10*s.* instead of ordering a weekly payment. It was contended on the part of the employer, in support of the appeal, that the word "may" in subsection 4 of Rule 17 meant "must," on the authority of *Julius* v. *The Bishop of Oxford* (5 App. Cas. 214), and that the County Court Judge was bound either to

proceed with the arbitration and allow the respondent to avail himself of the point which he desired to raise, or else to adjourn the arbitration to enable the respondent to file an answer. Here the County Court Judge took neither of those courses; he proceeded with the arbitration, but he refused to allow the respondent to raise the point which he desired to raise.

Mr. *Harold E. Brandon* appeared for the employer; Mr. *Abinger* for the workman.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was an application under the Workmen's Compensation Act, and particulars of the claim had been given by the workman, but the employer had not taken the trouble to file any answer. At the hearing, evidence was taken in support of the application, but no indication was given as to the height of the building. Objection was taken on the part of the employer that it had not been proved that the building exceeded 30 feet in height. The County Court Judge found as a fact that the building did exceed 30 feet in height, and by consent he fixed a lump sum to be paid as compensation. In his opinion, there was nothing to appeal about. With regard to the true construction of Rule 17, para. 4, of the Workmen's Compensation Rules, he thought that, where the respondent failed to file an answer, the County Court Judge might take either of the courses mentioned in the rule, but that he was not bound to take either. There seemed to him to be nothing compulsory in the rule.

LORD JUSTICE RIGBY said he was of the same opinion.

LORD JUSTICE VAUGHAN WILLIAMS said he also agreed that the appeal should be dismissed. He did not think it was necessary in this case to determine the meaning of the rule, but he wished not to be taken as agreeing that where the rule applied the County Court Judge had jurisdiction to do anything except one or other of the two things mentioned in the rule.

# CASES

DETERMINED IN

# THE COUNTY COURTS.

## WILLIAMS *v.* DUNCAN.

*The Times, November* 25, 1898.

*Accident.*—SECT. 1, 1.

An attack of colic through lead poisoning held not to be an accident.

AT Southwark County Court, before his Honour JUDGE ADDISON, Q.C., a window-blind painter named Williams brought a claim under the Workmen's Compensation Act against Mr. William Duncan, window-blind manufacturer, of Newington-causeway. Mr. *Sherman* was counsel for the respondent. The evidence given by Williams was to the effect that he entered the respondent's service on July 6, and on August 30 he was seized with colic, set up by lead poisoning, which caused him to keep from work for fifteen weeks. He was still far from recovered. He had been a painter twenty-five years, but had never suffered from colic before.

Mr. *Sherman* submitted that the applicant had no case, because illness contracted through employment was not an "accident" within the meaning of the Act, which read: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment

is caused to a workman the employer shall be responsible." The question of "phossy jaw" was, he continued, raised before the House of Commons during the progress of the Bill, and it was asked if this malady would come within the meaning of "accident." The answer of the Government was that they were advised not. Nobody could, in plain English, say that sickness was "accident."

His Honour: I must construe the word "accident" as meant by the Act, not in the dictionary sense. Sickness, in a broad sense, is an accident of life.

After further argument on this point, his Honour found for the respondent, on the ground that the applicant had not suffered "personal injury by accident." He, however, assessed the applicant's damages at £6 10*s.*, which he would be entitled to should this judgment be reversed on appeal.

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## MATTHEWS *v.* BEDWORTH.

(1899.) 106 *Law Times*, 485.

*Arising out of and in the course of—Attempt to save Human Life.*—Sect. 1, 1.

An accident occurring while making an attempt to save the life of a fellow-workman was held to arise out of and in the course of the employment.

At the Nuneaton County Court, before his Honour Judge Wightman Wood, Mary Matthews, widow, Mill-street, Bedworth, sued the Bedworth Brick, Tile, and Timber Company, Limited, for £300 compensation, under the Workmen's Compensation Act, 1897.

*Vachell* (instructed by *W. L. J. Orton*, Coventry) was for the applicant; and *Hugo Young*, Q.C. (instructed by *Hughes & Masser*, Coventry), was for the respondent.

*Vachell*, in opening, said that in August applicant's husband was at work for the respondent company, on their premises in the Bulkington-lane, Bedworth, with Benjamin Burden (a foreman employed by Mr. North, of Aston) and a man named Moran. They were engaged in cleaning out an old shaft with the idea of sinking a well, and, on the morning of August 27, went to work at six o'clock. Moran was the first to descend, and he took a candle with him, in order to ascertain the state of the air. He came in contact with choke damp, was overpowered, and fell from the skip to the bottom. At this time, Matthews was on the bank with Burden, and the former called out, "Are you alive?" and hearing Moran reply, said, "Who will help me to get my mate out?" Burden said it was a dangerous task, but eventually both of them got into the skip, and descended. When they had been lowered about 15 yards, the fumes were found to be insupportable, and Burden signalled to be brought up; but before they reached the top both were overpowered, and Matthews fell from the skip, whilst Burden reached the bank unconscious. Matthews was killed, and, in his opinion, the widow was entitled to full compensation under sched. I of the new Act for £300, for the fatality did arise whilst the deceased man was following the course of his ordinary employment. True, he was not engaged to do rescue work, but it must have been in the contemplation of the company that accidents of that sort might occur, and he submitted that it would have been one of the incidental conditions of Matthews' employment, and it would be a matter of duty, as well as of common humanity, that the man should undertake such work as he did in this instance, and which resulted in his death.

Benjamin Burden stated that in August last he was in the employ of Mr. North, of Aston, and was engaged in superintending the cleaning out of an old shaft. The respondents' men were helping him, one being named Moran, and another being the deceased. A steam-crab and a square skip were used, a fan being used for the purposes of ventilation.

There was choke damp in the shaft—this being generally known—which, about 70 feet down the workings, entered the shaft. At 6 a.m. on the day in question they started work, Moran going down first in the skip. Witness told Moran not to go down without first testing the air, and Moran replied, "Old man, we know our business." Witness heard him fall, and deceased said, "Oh, my God, my mate has fell out of the skip!" Deceased then volunteered to go down, but witness said he must not do so, adding that "If anybody goes, I'm going with you." They both went down together, and the gas caught them; witness cried out, "Pull up;" and then became unconscious.

By *Hugo Young:* Witness said, when Matthews volunteered to go down, "You mustn't go down," and requested him several times not to do so. He also said, "If you send men enough to fill the pit, they'll all stop there." Matthews heroically decided to descend.

Re-examined: Matthews called down the pit, "Tom! are you alive?" and Moran answered, but witness could not tell what he said. Moran was brought up alive.

Dr. E. W. Orton gave evidence to the effect that Matthews died from injuries received.

*Hugo Young*, for the respondents, said that nobody could hesitate to say that praise was due to Matthews for his self-sacrifice and his desire to save life; but the question before the court was, as to whether his widow was entitled by law to claim the amount stated from the company. He quoted a number of cases which, he claimed, bore on the case; and took as an illustration the position of a man engaged at work on a ship in dock, and who, whilst so engaged, heard a cry of "Man overboard," went to the rescue, and lost his own life. In such a case, would it be said that the man was following the case of his ordinary employment? Under the Act, the accident must arise out of and in the course of the man's employment; and the Court of Appeal had laid it down that both these things must obtain. In the present case, however, the man volunteered to do the work, and

insisted upon doing it, although he was cautioned; and it could not be said that he went down the shaft to discharge the work for which he was engaged. He volunteered to attempt the rescue of a fellow-employee, and it was an heroic act; but where there had been other accidents there had been heroic acts, and was it to be said that in cases where men did so volunteer, their employers were to take the whole responsibility of those actions; and if the men were killed, were the employers to be liable to the widows of the deceased men? The Act was intended to cover injuries occurring which men suffered owing to the employers not taking proper precautions; but how could employers take precautions against this kind of thing? When a man volunteered for rescue work, he must do it on his own responsibility. He might remark that the company, whatever they might feel disposed to do outside, were insured in reference to this matter, so that he hoped no slur would rest upon them. They were only fighting the case from a legal aspect.

*Vachell* said he had made no slur upon the company, but it was obvious that the fact of their being insured did not prevent them from paying this £300, should they have thought fit to do so. These men were engaged in cleaning out the shaft, and in doing all necessary work in connection with it. If the skip had fallen down the shaft, it would have been the duty of one of them to have got it out again, and to descend by rope, ladder, or any other way, in order that it might be recovered; and in that case his friend would have admitted that he had no answer; but as it was only a fellow-workman, his friend said that there was no liability on the respondents' part. The contention on the applicant's part was, that there was a duty from Matthews to perform for the employers, as well as for the fellow-workman at the bottom of the shaft, when he knew that the man was alive. The man could not wait until a meeting of directors was summoned, a quorum formed, and instructions issued as to what he should do. There was such a thing as an agent of necessity, when a man had to act in an emergency as he

thought best; and here, apart from consideration of the workman himself, the company had practically £300 lying at the bottom of the shaft, which they would have had to pay under the new Act had the man died; so that, putting aside all questions of humanity, the deceased was protecting the interests of his employers in attempting to save that £300 worth of flesh and blood. As to Burden, he was not the foreman over these two men, but was apparently a foreman to Mr. North, of Aston, and was not in the employ of the respondent company. Matthews was their only representative on the bank after Moran's accident, and when the sudden danger arose, with no directors about, it was in the interests of his employers that he should have done as he did.

His Honour said he was not at all surprised that the case should have been contested by the employers, and he did not think there should be any imputation cast upon them. The Act was one which effected the transfer of an enormous lot of money from the pockets of some persons into those of others. These were the early days of the Act, and it was not surprising that people should contest each doubtful clause, and should desire a judicial interpretation. He did not think it was at all to be assumed that the employers did not admire the conduct of Matthews as well as anybody else, and would have been willing—and might still be willing, for all he knew—to give a gratuity to his wife. The decision in this case must have a far-reaching effect when finally settled. He thought it perfectly clear that an employer was not liable to compensate every widow whose husband lost his life in trying to save that of another person, for it was obvious that, in many instances, however heroic the act might be, the employers could not be liable, as, for instance, a workman, whilst passing along a road on his employer's business, and being killed whilst endeavouring to stop a runaway horse. In that case the man would do it at his own risk; but the present one was not a case of that kind at all. Here the man was in the same employment, and

engaged in the same work as the one who was alive at the bottom of the pit. It seemed to him that his judgment must be for the plaintiff, and that he must hold that these fatal injuries did arise out of and in the course of the man's employment, because, although he was not acting under any direct order to do what he did, he acted under a reasonable belief that his employers would have wished him to do what he did. It was done not only for the benefit of the man for whom he went down, but also for the benefit of his employers, who would certainly have sustained considerable pecuniary loss if the man who fell first had been allowed to lie there and had lost his life. There must be many cases in which men would act without direct authority, and it would be very disastrous to employers if people in their employ were, under no circumstances, to do anything without having been told explicitly what to do. Judgment would be for the plaintiff.

Compare cases (*ante*, pp. 1, *et seq.*); *Rees* v. *Thomas* (p. 9) was a case about acting for the protection of the master's property.

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## BURRELL *v.* AVIS.

(1898.) 106 *Law Times*, 61.

*Serious and Wilful Misconduct.*—SECT. 1, 2 (*c*).

Mounting a ladder while drunk with a long piece of timber on one shoulder and out of bravado was held to be serious and wilful misconduct.

THIS was a claim under the Workmen's Compensation Act, 1897, made by the applicants, who were the dependents of one Samuel William Burrell, against the respondent, William Avis, a builder. In May, 1898, the deceased, Samuel William Burrell, entered into the following contract with the respondent: "To Mr. W. Avis.—I hereby agree to do the carcassing to two houses in Bovenay-road, to your satisfaction for the

sum of twenty pounds, money to be advanced as the work proceeds. Work to be done as follows: Wait on bricklayers, prepare and fix all lintels and turning pieces, prepare and fix all partitions, prepare and fix all joists, prepare and fix all timbers in roof complete and ready for slaters, prepare and fix large board facias and soffits. Do all that is usually included in carcassing, whether specified or not.—W. BURRELL." The respondent found the materials to be used by the deceased, but the deceased found tools, and paid the labourer whom he employed to assist him. The respondent superintended the work to see that it was done to his satisfaction under the contract, and payments were made by him to the deceased at the end of each week proportionate to the amount of work done. The payments made under the contract during the lifetime of the deceased were respectively £1, £5, £2, £1 10*s.*, £3, £4. The balance of £3 10*s.* was paid to the widow. The deceased worked as and when he liked without consulting the respondent, and there was some evidence that he went away during the time that the contract was running to see after another job. The respondent said he had no power to dismiss the deceased, as he was working under the contract.

On July 15, 1898, the deceased came to the work late, about ten o'clock; he remained for twenty minutes, and then left to fetch the dinner beer, being absent over an hour. On returning he put some tools and the half-gallon bottle of beer into his basket, and said to his labourer, "Take that up top; I will follow you and will bring a piece of stuff (meaning wood) with me, and show you how to come up London style." Deceased then put a piece of quartering, about 13 feet long and weighing 26 lbs., on his left shoulder, and held the wood with his left arm. He mounted the ladder, clutching at each round with his right hand. At the top he missed his clutch and fell, and fatally injured himself. It was proved that no wood was required for the purpose of the work, there being more than sufficient at the time on the scaffold above. Evidence was given that the proper way to mount a ladder under such circumstances was by gripping the side of the ladder, and that

no one would in the ordinary course of work go up, as the deceased did, clutching at the rungs. Numerous witnesses were called by both sides on the question of drunkenness.

*W. Addington Willis*, for the respondent, submitted: (1) That the deceased was not a "workman" within the meaning of the Act. He contended that Burrell was an independent contractor; that the Act contemplated the relationship of master and servant; and that such relationship must be shown to exist before a person engaged in an employment to which the Act applies could be held to be a "workman" within the definition. There were here none of the characteristics of service; no wages were paid, there was no power of dismissal, and no control was exercised over the deceased beyond the superintendence for the purpose of seeing that the work was done to respondent's satisfaction under the contract. On the contrary, the deceased was a master man, employing his own workmen, working as and when he liked, and making what profit he could out of the transaction. (2) That the accident was not an accident "arising out of" the employment. The words "arising out of" have a meaning different from the words "in the course of." The accident must be one which springs from the character of the employment; it must arise out of the risks attaching to the employment. Here the *causa causans* was the folly of the deceased in adopting an unheard-of method of mounting a ladder with a burden for the purpose of "showing off." (3) That the man was drunk, and, if so, the injury was attributable to his own serious and wilful misconduct. If that were not sufficient in itself, it would be coupled with the fact that he was not seriously engaged on his work, but was doing unnecessary work for the purpose of "showing off."

*Roskill*, for the claimants, contended that the deceased was a workman within the definition, which was drawn widely, and included "every person who is engaged in an employment to which the Act applies . . . whether his agreement is one of service, or apprenticeship or otherwise." He certainly came within the words "or otherwise." As to the second point, the

accident arose out of the employment, because it was part of the deceased's employment to carry wood up the ladder. On the third point, he contended that, even if the deceased was drunk at the time of the accident, drunkenness did not amount to "serious and wilful misconduct."

Judgment was delivered on the 4th of November. His HONOUR found that the deceased man brought the injury from which he died upon himself by his own serious and wilful misconduct. He reviewed the facts, and came to the conclusion that the deceased was drunk at the time of the accident. The deceased went up the ladder not holding the side, which was the usual way, but clutching the rungs. The whole proceeding was a piece of bravado—in other words, he was showing how he could do it. There was plenty of corroboration of this. The taking up of the wood was not necessary for the purpose of his work. His Honour could conceive no stronger case than this of serious and wilful misconduct. Upon the other points, he still thought that the deceased was a workman. It was true there was a small contract under which he was working, but that is a common way of engaging labour. The deceased was acting in the scope of his employment. He took up a plank when drunk, but that was simply a case of doing his work carelessly. In the event of the appeal succeeding, his Honour fixed the amount of compensation at £150 for the widow and £50 for the daughter. He gave the respondent costs on the C scale.

Solicitors: *Stibbard, Gibson & Co.: E. C. Rawlings & Butt.*

See *Rumboll* v. *Nunnery Colliery Co.* (*ante*, p. 28).

## STACK *v.* COUNSELL BROS.

(1899.) 106 *Law Times*, 342.

*Scaffolding.*—SECT. 7, 1.

**Two pairs of trestles with boards resting on them held not to be scaffolding. Meaning of expression "scaffolding" considered.**

IN the Marylebone County Court, on the 25th of January, in the case of *Stack* v. *Counsell Brothers*, his Honour JUDGE STONOR delivered the following judgment:—The material facts of this case are as follows: The applicant was working, on the 8th of September last, at Baker-street in this district, and was laying a joist about 25 feet long. He had hold of one end, and a carpenter had hold of the other, and the latter let his end fall, and the joist twisted and fell on the applicant's leg and injured it. Notwithstanding such injury, he continued at work during the week ending the 9th, and worked three days in the following week and one day in the next. On the 16th of September he went to St. Mary's Hospital, and there saw Dr. Wood, who advised him to rest and do no work. The applicant, however, worked one day more in the following week ending the 23rd, but has been unable to work since. The applicant originally claimed as compensation for the injury he had suffered a capital sum of £5, which was erroneous, as under the Workmen's Compensation Act he could be entitled only to weekly payments for such time as he might be disabled from working wholly or partially. The respondents' defence to the claim is that the accident happened whilst the applicant was at work on a building which did not "exceed 30 feet in height" and was not being "constructed or repaired by means of a scaffolding." The applicant's evidence as to the consequences of the injury he had received was not satisfactory, considering how far the

latter might have resulted from his subsequently working, and, in consequence of the absence of any medical evidence on the point, and the insufficiency of the evidence as to the building in question given by himself and by the respondents' foreman to enable me to decide the points raised by the defence, the case was adjourned to the 10th of January. On that day medical evidence was forthcoming, and it was admitted that the applicant was entitled to an award in his favour if the building was within the provisions of the Act, and it was agreed that the sum of £10 should be awarded to him in full compensation if he were so entitled. The respondents' foreman and the applicant were then re-examined as to the building in question, and a plan was put in evidence as to the nature and circumstances of such building. It appeared that an ordinary dwelling-house more than 30 feet high stood facing Baker-street, on the ground floor of which there was a shop, and at the back of the shop, a continuation of the shop, or show-room, erected over an addition to the original basement, which extended beyond the show-room to the party wall of the house with the adjoining premises. At the back of the show-room, and over the projecting basement, which was roofed with leads, the building where the accident now in question happened was in course of erection, and was much less than 30 feet in height. It consisted of four brick piers built upon the ground, through the basement roof and attached and "tied" in the middle of each pier to the adjacent walls (for which four courses of bricks were taken out of the latter), and of a roof resting solely on the four piers, and that, excepting the connection of the piers with the adjacent walls, the same was a completely separate building, so that if the dwelling-house, shop, and basement had been taken down carefully the building now in question would still have remained. A portion of the wall of the show-room had at the time of the accident been removed in order to join it with the building in course of erection. On the floor of the latter there were at the time of the accident two pairs of trestles with two boards resting

upon them as a temporary scaffold to enable the workmen to work at the roof or ceiling, and in the basement below there were other pairs of trestles with boards resting on them for a similar purpose. To bring this case within the Workmen's Compensation Act (sect. 7) it must be shown, firstly, that the accident occurred "in, upon, or about a building 30 feet high;" and, secondly, "that such building was being constructed or repaired by means of a scaffolding." The first question seems to me to depend upon whether the connection of the piers on which the building now in course of erection rests with the walls of the original building, and its resting on the basement below makes it part of such original building, and that the accident occurred, therefore, "on, in, or about" the latter, and upon the whole I am inclined to think the building now in course of erection was part of such original building, and that the accident did happen "on, in, or about" it, and that so far this case is within the provisions of the Act. But it is unnecessary for me to decide this point, as, with regard to the second question, I think that the building now in course of erection was not being "constructed or repaired by means of a scaffolding," for I think that the proper meaning of "a scaffolding" (at all events, for the present purpose) is that in which it is used by employers and workmen in their business, and by every one in common parlance, and given in the "Glossary of Architecture" (5th edit.), vol. i. p. 414, viz. "A temporary erection of poles, planks [cords], etc., for the use of workmen in building walls or executing any work which they cannot otherwise reach," which is always secured and fixed, and not a temporary erection of two pairs of trestles with boards across them, unfixed, unsecured, and movable by the workman as occasion may require. If the word "scaffolding" had been used without the article prefixed to it, I might have had some doubt and difficulty in the matter, on account of the great latitude and variety of definitions of the words "scaffolding" and "scaffold" contained in the various dictionaries, although I believe with scarcely an exception they all use

with regard to both words the word "timber," which certainly appears to exclude the temporary scaffolds or erections to which I have referred. The prefix of the article, however, appears to me to remove all doubt from the subject, and I must add that there is a strong argument in favour of attaching the meaning given by the Architects' Glossary to the word in the clause under consideration from the manifest restrictive intention and operation of the clause with regard to the building business. It begins by first restricting such operation to buildings "30 feet in height," no doubt on account of the additional danger attending on buildings of that and greater height, and then proceeds to further restrict it to such buildings if they are "constructed or repaired by a scaffolding," no doubt also on account of the additional danger arising from the use of the same. Now, if this was to extend to every unfixed and movable erection of trestles, boards, ladders, etc., as contended on the part of the applicant, these words would be wholly nugatory, inasmuch as every building 30 feet high must be constructed by such means, at all events as to the roofs, ceilings, etc., and the words "constructed or repaired by a scaffolding" would have no effect, restrictive or otherwise, whatsoever. Again, the position of this further restriction, coming immediately after and in conjunction with the restriction as to height, points, I think, clearly to such "a scaffolding" as is used of necessity in the construction or repairing of buildings of that or, at all events, of considerable height. I therefore find for the respondents upon the second point which they have raised, and I dismiss this application, but with leave to appeal, if such leave is necessary.

*Clay, solicitor for applicant; Lynch, counsel for respondents.*

See *Hoddinott* v. *Newton Chambers* (*ante*, p. 62); *Wood* v. *Walsh* (*ante*, p. 68).

An appeal lies to the Court of Appeal without the leave of the arbitrator. See Sched. II. para. 4.

## WATKINSON *v.* CROUCH.

*The Times, July* 24, 1899.

*Factory—Chaff-cutter—Factory and Workshop Act,* 1878 (41 & 42 *Vict. c.* 16), *sect.* 93.

Employment on a steam chaff-cutting machine has been held not to come within the Act.

AT the last sitting of the March County Court, his Honour JUDGE WILLIS, Q.C., delivered judgment in the case of *Watkinson* v. *Crouch,* which was heard at the May sitting. It was an application for compensation for injuries sustained while employed in attending to a chaff-cutting machine, which was worked by a steam-engine. The respondent was the owner of the machine, which was let out to farmers. On December 14 the machine was at Mr. Watson's farm at Manea in charge of the applicant, and was being used to cut up oat and wheat straw into chaff. The engine and machine stood in the open air in the farmyard. While working, the strap connecting the engine with the machine was displaced. The engine was stopped and the strap replaced. The applicant, in passing round the large wheel, which was again in motion, to get to the engine, was caught by the strap, and his right arm was drawn into the wheel and torn from its socket. For the loss of his arm the applicant claimed compensation. Dr. J. W. Cooper, on behalf of the respondent, objected that the employment was not an employment within the meaning of the Act. His Honour found as a fact that the accident arose out of and in the course of the applicant's employment, and was not due to the misconduct of the applicant. As to the objection that the employment was not within the Act, his Honour said it was clear that the Act only applied to some, and not to all, employments. To see what those employments were reference

must be made to the seventh section of the Act. In that section there were no words which said that the Act should apply in the case of a person being employed in or about the management of dangerous machinery. It was at once seen that the applicant could only succeed by showing that his employment was on, in, or about a factory or engineering work. After reading the definition of engineering work, it was clear that the applicant was not employed in engineering work. Nor was the applicant engaged on or about a factory, using that word in its ordinary sense. Having examined the definition of factory as laid down in the Act, he came to the conclusion that the applicant was not engaged on any factory, and that the definition of non-textile factory contained nothing that could comprise the cutting of hay and straw. He did not think the applicant was at work on any premises, or that steam was being used in aid of any manufacturing process. He therefore must reject the claim and give judgment for the respondent.

Also reported in 107 *Law Times*, 328.

Other arbitrators have decided these and similar cases, *e.g.* threshing-machines, in a different manner. See Part 3 of the definition of "non-textile factory" in sect. 93 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16).

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## BENNETT *v.* AIRD & SONS.

(1899.) 107 *The Law Times*, 550.

*Engineering Work—Sewer—Any other Work—Machinery—Mechanical Power.*—SECT. 7, 2.

The other work included in the definition of engineering work is work *ejusdem generis* with work on a railroad, harbour, dock, canal, or sewer.

Laying pipes for water, gas, or any other purpose is *ejusdem generis* with constructing a sewer.

A pulley and chain suspended on shears fastened together at the top and forming a tripod is machinery.

The other mechanical power mentioned in the definition of engineering work is *ejusdem generis* with steam or water.

Meaning of mechanical power considered.

THIS was a decision delivered by his Honour JUDGE STONOR at the Marylebone County Court on October 12, 1899.

The applicant in this case was employed by the respondents in striking an iron wedge to open a road underneath which water-pipes were being laid by the respondents. Another workman was striking the wedge alternately with him, and knocked it on one side. The applicant's hammer missed the wedge, swung right round, and dislocated the applicant's shoulder, which he since has been unable to use. The applicant deposed that he had sometimes to help in lowering the pipes, and for that purpose in working a pulley by which they were lowered. The respondents' manager, who appeared as their representative by leave under rule 32, deposed that there was no mechanical power at all used on the job (which I think was erroneous), and submitted that the case did not come within the Act. He admitted that the applicant was entitled to damages if it did fall within the Act, which is certainly very doubtful. The only words in section 7 (1) which can include it are "engineering work" as defined by the same section (2), viz. "any work of construction, alteration, or repair, of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." Now, the first question is whether the words "any other work" in this section 7 (2) means any other work whatever or only any other work *ejusdem generis* with work done on a railroad, etc.; and "sewer" of course also falling within the subsequent words of the section, which I shall consider hereafter. This point is very ably treated in Mr. Minton-Senhouse's and Mr. Emery's Treatise on the Employers' Liability Act and the Workmen's Compensation Act, 1898, p. 149, and I agree in the view there taken, that the words "any other work" must be restricted to work *ejusdem generis* with the works

previously mentioned in the section, but I think that the laying of pipes for water, gas, or any other purpose, is *ejusdem generis* with works for the construction, alteration, or repair of a "sewer," and that so far the present case is within the Act. The subsequent words, however, requiring that the work should be one in which "machinery driven by steam, water, or other mechanical power is used," give rise to further and very difficult questions. It is, I think, evident that machinery (a word of which no definition is given by the Act) was used on this work, viz. a pulley and chain suspended on shears fastened together at the top, forming a tripod, but the question remains whether such machinery was "driven by any mechanical power" or not. Now, a pulley is defined as a mechanical power along with the lever and others in Nuttall's Dictionary, and if the action of the pulley is to be regarded as the mechanical power that drove the machine and lowered the pipes, the case is within the Act; if, on the other hand, the manual labour which set the pulley in motion is to be so regarded, the question still remains whether such manual labour is to be regarded as "mechanical" or not. In Webster's Dictionary the word "mechanical" is given, amongst other meanings, the following, "acting by physical power," and this would almost seem to meet the present case; but on the whole I think that the words "mechanical power" must also be construed *ejusdem generis* with those mentioned immediately before, viz. steam and water, which act automatically and, generally speaking, continuously after having been put in motion in the first instance by manual labour. I therefore, on the whole, am of opinion that the present case does not fall within the Act, and give my award for the respondents without costs.

The above is perhaps the most important decision yet delivered in a County Court. It has been held by another Metropolitan County Court Judge that laying drain-pipes did not come within the definition.

## BELSEY *v.* SADLER & CO.

*The Times, October* 4, 1899.

*Engineering Work—Hydraulic Crane.*—SECT. 7, 1 AND 2.

The construction of an hydraulic crane without the use of mechanical power is not an engineering work.

AT Southwark County Court, an application for an award under the Workmen's Compensation Act was heard by JUDGE ADDISON, Q.C. The applicant was an engineer named Belsey, and the respondents were Messrs. Sadler & Co., engineers, of Three Oak-lane, Tooley-street. Mr. *H. Brandon*, barrister, appeared for the applicant; and Mr. *Hurd* for the respondents. The applicant's evidence was to the effect that whilst putting up an hydraulic crane at the factory of Messrs. Slee, Slee, & Co., vinegar manufacturers, he injured one of his fingers, which was now permanently stiff. In consequence of the injury he was unable to carry on his employment for six weeks. Mr. *Hurd* contended that the applicant could not recover, on the ground that the accident did not happen "on, in, or about a factory of which the respondents were the occupiers," and that the work of erection of an hydraulic crane was not an "engineering work" or "construction by steam or other mechanical power" within the meaning of the Act. Mr. *Brandon*, on the other hand, argued that such a contention was unreasonable, because an employer, to defeat the Act, would simply have to remove his work to another's factory and thus escape liability for accidents.

HIS HONOUR, in the course of the hearing, said that the Act was so finely drawn and was so difficult and led to so many absurdities that one could not argue from reason or analogy, but must take the strict words of the Act. It

was made up of patchwork and was most puzzling; it was a complicated combination of compromises. In giving judgment he remarked that, in regard to the points raised, he must give the literal interpretation to the Act. He therefore came to the conclusion that the factory must be the factory of the undertakers or employers. In this case it was not, and therefore the respondents were not liable for the accident which occurred at Messrs. Slee's. On the other point, he was driven to the conclusion that the work in which the applicant was engaged at the time of the accident was not construction by steam or other mechanical power, and thus he had to find for the respondents. He would, however, be pleased to give the applicant any assistance he could to enable him to appeal.

As no mechanical power was used in the construction of this crane, the difficult point did not arise whether the "other work" mentioned in the definition of engineering work in sect. 7, 2 is *ejusdem generis* with the work of construction, alteration, or repair of a railroad, harbour, dock, canal, or sewer. See, however, *Bennett* v. *Aird* (*ante*, p. 138).

The applicant could not have proceeded against the occupiers of the factory on, in, or about which he was employed, because they were not his employers (section 1, 1), and they did not come within the provisions of section 4, since the erection of a crane was no part or process in their trade or business.

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## JONES *v.* WALKER.

(1899.) 105 *Law Times*, 579.

*Earnings—No Stipulation as to Rate of Wages—Injury during First Day's Employment.*—SCHED. I. 1.

Where no rate of wages has been expressly stipulated for and no payment made, an agreement may be implied for the usual rate of wages for that particular class of work in that locality at that time.

THE case of *Jones* v. *C. & W. Walker* was the first case brought under the above Act in the Birmingham County

Court. It was an arbitration at the instance of an injured workman, and was heard by his Honour JUDGE WHITEHORN, Q.C., on Tuesday, the 11th of October. It afforded a striking example of the contentious questions which are likely to arise under the Act for solution, even where the facts of the accident, the injuries sustained, and the liability of the employers to pay compensation under the Act are all admitted. The sole question was as to the basis on which compensation was payable. The undisputed facts were as follows: The applicant was Richard Thomas Jones, described in his application for arbitration as "blacksmith," employed at the time of accident as a "fitter." The respondents were C. & W. Walker, of Donnington, Salop, engineers, who were engaged in the erection of a gasholder for the Birmingham Corporation at Saltley. Jones, who had been out of work for seven weeks, called several times at the Saltley Works to ask Monk, the respondents' foreman there, for employment, stating that he had previously worked as a smith. On the last of these occasions, about 7.30 a.m. on the 11th of July, Monk told Jones that there was no smith's shop up as yet, but that he could go and help a fitter named Foxhall, who was engaged in fixing guide rails to stays for a gas-tank. About 10.30 a.m., when Jones had been at work some two and a half hours, Foxhall was bolting the rails at the top, and Jones was holding them in position at the bottom, when a sledge-hammer, in use by another workman at work 50 feet above, accidentally broke, and the head fell and struck Jones in the back, inflicting severe injuries, which had caused him total present incapacity to work. When Monk put Jones on to work, nothing was said as to rate of wages. In his previous employment as a smith his weekly earnings had averaged 33*s.* 6*d.* per week. He therefore claimed the maximum allowance under the Act, viz. half wages at that rate, or 16*s.* 9*d.* per week, after the first fortnight. It was admitted that the current rate of labourers' wages was 24*s.* per week, and that the respondents had tendered compensation accordingly at the rate of 12*s.* per week, which the applicant had refused,

and instituted these proceedings to recover the larger sum. The evidence as to the kind of work Jones was engaged to do for the defendants was conflicting.

*Parker*, solicitor for the applicant, referred to sched. I. para. 1 (*b*) of the Act, which provides that the amount of compensation payable shall be as follows: Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1. He argued that, though no doubt the language of the paragraph more properly applied to cases where the workman had been actually employed for more than a week, there was nothing to preclude an applicant in a case like the present, where the actual employment had existed for less than a week, from claiming compensation computed on his average weekly earnings in a previous and different employment. The paragraph said nothing about any contract between employer and employed, and in a case like this an agreed rate of wages to be paid, whether expressed or implied, could not be taken as a basis. Moreover, "earnings" meant wages actually received for work done, and not wages agreed to be paid but not yet due and payable. Consequently, as the applicant had received no earnings in the respondents' employ, the only possible basis of assessment was a former rate of earnings; unless the case was a *casus omissus*, for which the Act gave no remedy, a construction not to be put upon the Act except in the last resort.

Dr. *Showell Rogers*, solicitor for the respondents, pointed out that only one scale of compensation was provided by the new Act, and it was exceedingly small, the Legislative recognizing that a high scale applicable equally to accidents caused by an employer's negligence and to unavoidable accidents would be unjust. Consequently, no well-advised workman who could make out a cause of action under the

Employers' Liability Act or at common law would proceed under the new Act. Where, therefore, the only remedy was under the new Act, the workman not unnaturally would endeavour to "magnify his office" as much as possible. Accordingly, in the present case the applicant claimed to be paid as a skilled mechanic, and not as a mere labourer. There was no reasonable doubt as to the meaning of the paragraph, which throughout must be read with reference to "the same employer." If by the contract of service the rate of wages per week had been expressly agreed upon, it could not be said that because a week's wages had not been earned before the accident happened the applicant was entitled to pray in aid a rate of wages earned under a previous employer. If so, no employer would be safe in giving an odd job to, or in engaging as a handy man, a skilled workman out of work and glad to earn anything. Where, as in the present case, nothing is said at the time of engagement as to rate of wages, the capacity in which the workman was employed must be regarded, and the current rate of wages in such employment be taken to have been impliedly agreed upon. Lastly, "earnings" did not necessarily mean wages earned and paid, but included a rate of wages expressly or impliedly agreed to be paid for work to be done. This was supported by the expression "able to earn" in para. 2 of the schedule.

His Honour: In this case, which has been very well argued on both sides, a somewhat important question under the new Workmen's Compensation Act is raised. I find on the facts that the applicant was engaged as a labourer and not as a smith; and that he, whilst engaged as a labourer, with no special agreement as to terms, after two and a half hours' work, and before any wages—or any to speak of—had been earned or paid, met with an accident clearly incapacitating him from labour, not entirely, but to a great extent. The liability of the employers under the new Act is admitted, and there is no dispute as to the facts of the accident or the injuries sustained. The question, therefore, simply is whether the Act enables the Court to give the injured workman any—

in other words, whether it furnishes the Court with any rule, scale, or criterion for ascertaining the amount of—compensation in circumstances which perhaps were not very definitely contemplated when the Act was framed. It is plain enough that what was mainly contemplated was the case of a man who had been earning and receiving weekly wages. Is the case of a man who has not excluded? Two questions of construction arise under the first schedule, paras. 1 (*b*) and 2. First, can you in such a case as this look back to some former employment under different masters in which he was earning other wages? Secondly, if you cannot, can you infer or imply a rate of wages from the terms of the engagement, though no wages have been actually earned owing to the accident happening immediately after the engagement? On the first point I hold that you cannot look back to any former employment. That cannot be the right construction. If it were, the workman would always select a previous employment at perhaps very high wages when he was younger and abler to fix his present employer with compensation which at such a rate would be unjust, and, I think, not required or warranted by the words of the schedule. The rate of wages is the rate of wages in the employment in which the accident happened. But does that prevent the workman from getting any compensation where no rate of wages was especially agreed to or even to any perceptible degree earned? I think not. I must bear in mind the purpose of the Act, and endeavour to carry it out loyally. The object is to give workmen engaged in employments to which the Act applies compensation in every case where they are injured in the course of the employment of their masters. Here, I think, I ought to hold that the "weekly earnings"—to use the term employed in the first schedule to the Act—though not received, nor even to any preceptible degree earned, are the earnings which would, according to the custom of the trade, flow from the engagement. As to that there is no dispute. It is admitted that the current rate of wages of a labourer is 24*s.* a week, and that consequently, the weekly compensation

—which the respondents have offered to pay, and now offer to pay—would under the provisions of the first schedule, para. 1 (*b*), be 12*s*. per week. On that footing I decide this case. Now, as to the costs. Do you ask anything as to the costs, Dr. Rogers?

Dr. *Rogers* stated that the Palatine Insurance Company, Limited, the real defendants, did not ask for costs. As, however, the great majority of these cases were the subject of insurance, it was desirable that it should be known that leniency in the present case must not be taken as a precedent, nor workmen be led thereby to suppose that they can indulge in litigation under the new Act without any risk of having to pay costs.

Though the headnote is not fully borne out by the report of the decision, it probably merely amplifies the expression "according to the custom of the trade."

See *Jones* v. *Ocean Coal Co.* (*ante*, p. 94); *Keast* v. *Barrow Haematite Co.* (*ante*, p. 99); *Appleby* v. *Horseley Co.* (*ante*, p. 103); *Price* v. *Marsden* (*ante*, p. 108).

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## BROWN *v.* LONDON & NORTH-WESTERN RAILWAY.

*The Times, September* 22, 1898.

*Payment—Letters of Administration—Widow and Children.*—SCHED. I. 4.

Arbitration adjourned in order that the widow might take out letters of administration to the estate of her deceased husband.

AT the Liverpool County Court, Theresa Brown brought an action under the new Compensation Act against the North-Western Railway Company for damages for loss of her husband, a brakesman, who was fatally injured in Wapping tunnel. The Judge expressed surprise that no lawyers appeared in the case. The plaintiff had arranged to accept

£200 on behalf of herself and five children. His Honour explained that under the Act the plaintiff would have to take out letters of administration, and adjourned the case for the purpose. A representative of the company said they desired as far as possible to save the woman trouble and expense. The claim was for a total amount of the deceased's earnings for three years preceding the death, and £15 for each of the children to be invested in the Post Office Savings Bank, the balance to be handed to the widow. The claim had been fully met by the company, who had also allowed the widow £10 as living expenses immediately after the accident. Had the man been killed before June 30, when the new Act came into force, she would have been entitled to only £100 from the insurance fund connected with the railway company.

The Act does not impose an obligation on the widow to take out letters of administration.

See *Coleman* v. *South-Eastern Railway* (*post*, p. 151) and the following letter to the *Times* :—

*The Times, September* 27, 1898.

SIR,—The serious error to which Mr. John Aird calls attention in your issue of to-day—that it is necessary for a widow to take out letters of administration in order to recover compensation for herself and her children—may have arisen, not from considerations respecting estate duty, but respecting the payment and distribution of the fund. For this purpose there is certainly no need to take out letters of administration, since the Judge or other arbitrator has power to make any direction he thinks fit for the benefit of the dependents. The fourth paragraph of the first schedule to the Act deals with the point as to whom the money is to be paid :—

"The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependents, or, if he leaves no dependents, to the person to whom the expenses are due, and if made to the legal personal representative shall be paid by him to or for the benefit of the dependents or other persons entitled thereto under this Act."

The effect of this has been summarized at p. 24 of a small work entitled "A Handbook to the Workmen's Compensation Act, 1897," as follows :—

"If the workman has succumbed to his injuries, the Act provides that

any compensation awarded must be paid (1) to the legal personal representative (if there be one) for the benefit of the 'dependents' (if there be any), or, if not, of certain other persons: or (2) if there be no personal representative, to or for the benefit of the dependents; or (3) if there be no dependents, to those other persons."

Again, the question is thoroughly commented on in "Accidents to Workmen" (on the eve of publication):

"If there be an executor or administrator, the whole sum awarded must be paid to him. He does not, however, receive it as personal representative of the deceased workman, nor is it part of the workman's estate or liable for his debts. He holds it as a trustee under the statute.

"It is to be 'paid by him to or for the benefit of' the persons entitled under the Act. Now, these persons and the amounts they are respectively to receive must in default of agreement be determined by arbitration, so that the personal representative would have no discretion as to the method of distribution; but it appears from this paragraph 4 to be in his discretion to apply the moneys in any way he considers to be for the benefit of those entitled. The power of ordering a method of investment is expressly given to the arbitrator by paragraph 6, and, if he exercise that power, the legal personal representative would be deprived of his discretionary power and would be compelled to follow the order of the arbitrator, because he would take the payment subject to the trust. It is to be observed that paragraph 6 empowers an order for investment or other application for the benefit of the person entitled. Presumably the arbitrator can make it part of his award that the legal personal representative shall hand over the compensation or part of it to the persons entitled, or to some person for their benefit. If the award is silent on the matter, the personal representative has a discretion either to pay it to those entitled or pay it for their benefit, which it may be would include payment *qua* investment. This latter, however, is not certain, because, in the first place, it would be an exceptional power to give the legal personal representative; and, secondly, the language of paragraph 4 is 'paid . . . for the benefit of,' whereas in paragraph 6 it is 'invested or otherwise applied for the benefit of.'

"Where one or more of the dependents are infants, since they are as a rule unable to give a receipt for money, the sum awarded should in no case be paid direct to them unless by direction of an arbitrator.

"The arbitrator should consider whether it would be better for each recipient to have the moneys coming to him invested or applied by his (the arbitrator's) order, or to leave the matter to be dealt with by the legal personal representative.

"What has been said as to the powers and duties of the legal personal representative applies also to the employer, where there is no personal representative. The words of the paragraph are the same in respect to both. The employer is to pay it 'to or for the benefit of' the recipient. As it would in many cases be unwise to give the employer such powers, it is suggested that in every case the arbitrator ought to make an order

under paragraph 6; probably the employer would be well advised to insist upon an order."

Apologizing for the length of this letter, but pleading the importance of the subject,

I am, Sir, yours faithfully,

R. M. MINTON-SENHOUSE.

Temple, September 23.

*The Times, October* 4, 1898.

SIR,—You can hardly be expected to open your columns to a lengthy discussion upon the technicalities of an Act of Parliament, although it does involve the question whether the widow of an intestate workman need take out letters of administration to his estate—an estate which, I may mention in passing, may not exist, and to which therefore letters would not be granted. I will only refer your correspondent, Mr. J. H. Knight, to my communication published by you on September 27, and add a remark on the two points of his letter. There is no ambiguity in the expression "legal personal representative." It means executor or administrator. And the Act says that, if there be none at the time of payment, the compensation "shall" be paid to or for the benefit of the dependents. As to the possibility of "the true personal representative" "turning up" and obtaining a second award against the employer, it must be remembered that the liability of the employer is limited to £300, and that the personal representative or a dependent could only take further proceedings for the balance of that sum unpaid, and for the benefit of any dependents who were not represented in the previous agreement or award.

I am, Sir, yours faithfully,

R. M. MINTON-SENHOUSE.

Temple, October 1.

## COLEMAN *v.* SOUTH-EASTERN RAILWAY.

*The Times, February* 28, 1899.

*Costs—Counsel's Fee.*

**A fee to counsel for attending the hearing was allowed where the amount of compensation and its distribution among the dependents had been agreed, but the parties desired to have the terms of the agreement embodied in an award.**

AT the Southwark County Court, application was made to his Honour JUDGE ADDISON, Q.C., to enter an award under the Workmen's Compensation Act in the case of *Coleman* v. *The South-Eastern Railway Company.* The applicants were the widow and daughter of William Coleman, an engine-driver, who was killed through falling from one of the defendants' engines on January 11. The unfortunate man saw smoke proceeding from the axle-tree of his engine, and, on passing along the side of his engine whilst it was in motion, to ascertain the cause and oil the bearings, he fell, and sustained injuries from which he died a few days later. The defendant company admitted their liability, and had agreed that the compensation should be £300, but they desired the Court to enter the award and sanction a division of the money —namely, £200 to the widow and £100 to the daughter—so as to prevent any question from arising in the future. There was no objection to this division, and his Honour entered the award accordingly. Mr. *Thompson,* barrister, who appeared for the applicants, asked for costs. Mr. *Graves,* solicitor, who represented the defendant company, objected to counsel's fees, on the ground that counsel was not necessary in such a case where liability had been admitted and the amount agreed upon.

HIS HONOUR said he thought it proper that counsel should attend on such an occasion, because one never knew what

points might arise. The first case under the Act was an illustration of this. There the Judge said that the widow ought to have taken out probate, but he himself was not of that opinion. He would allow the applicants all the costs of that day, but not any that might have been incurred in preparing the case for trial, because the defendant company had admitted their liability seven days before the date of the hearing of the arbitration, should that have been necessary. The Act did not allow any one to recover costs incurred before five days of the hearing of an arbitration, unless in exceptional circumstances, because all that was not denied up to that time had to be taken as admitted.

When the provisions of the Act become elucidated and better known, it is doubtful whether arbitrators, at all events arbitrators who are lawyers, will or ought to allow such a fee. The case referred to is *Brown* v. *London and North-Western Railway* (*ante*, p. 147).

The five days referred to by the learned Judge has been extended to ten days by R. 2 of W. C. R. 1899: see p. 33 of "The Case Law of the Workmen's Compensation Act," by the Editor.

# APPENDIX.

## THE WORKMEN'S COMPENSATION ACT, 1897.

(60 & 61 Vict. c. 37.)

AN Act to amend the law with respect to Compensation to Workmen for accidental injuries suffered in the course of their employment. [6th August, 1897.]

A.D. 1897.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Liability of certain employers to workmen for injuries.

1. (1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of this Act.

(2) Provided that—

(*a*) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed;

(*b*) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid;

(*c*) If it is proved that the injury to a workman is attributable

A.D. 1897.

to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

(4) If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(5) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act.

Time for taking proceedings.

**2.** (1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case

of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

(2) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

Contracting out.

3. (1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependents than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

A.D. 1897.

(2) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependents as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the registrar under this Act.

Sub-contracting.

4. Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

Provided that the undertakers shall be entitled to be indemnified

by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

Compensation to workmen in case of bankruptcy of employer.

5. (1) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

Recovery of damages from stranger.

6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person.

Application of Act and definitions.

7. (1) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

A.D. 1897.

(2) In this Act—

36 & 37 Vict. c. 48. 59 & 60 Vict. c. 48.

"Railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railway Act, 1896; and "railway" and "railway company" have the same meaning as in the said Acts of 1873 and 1896:

58 & 59 Vict. c. 37.

"Factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provisions of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power:

50 & 51 Vict. c. 58. 35 & 36 Vict. c. 77.

"Mine" means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies:

57 & 58 Vict. c. 42.

"Quarry" means a quarry under the Quarries Act, 1894:

"Engineering work" means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used:

"Undertakers" in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition:

"Employer" includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer:

"Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to

his dependents, or other person to whom compensation is payable: A.D. 1897.

"Dependents" means—

(*a*) in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and 9 & 10 Vict. c. 93.

(*b*) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

Application to workmen in employment of Crown.

**8.** (1) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section 1 of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act. 50 & 51 Vict. c. 67.

Provision as to existing contracts.

**9.** Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Commencement of Act and short title.

**10.** (1) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(2) This Act may be cited as the Workmen's Compensation Act, 1897.

A.D. 1897.

Sections 1, 5.

# SCHEDULES.

## FIRST SCHEDULE.

### Scale and Conditions of Compensation.

*Scale.*

(1) The amount of compensation under this Act shall be—

(*a*) where death results from the injury—

(i.) if the workman leaves any dependents wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;

(ii.) if the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependents; and

(iii.) if he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he

may receive from the employer in respect of his injury during the period of his incapacity.

(3) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependents, or, if he leaves no dependents, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependents or other person entitled thereto under this Act.

(5) Any question as to who is a dependent, or as to the amount payable to each dependent, shall, in default of agreement, be settled by arbitration under this Act.

(6) The sum allotted as compensation to a dependent may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or by the judge of the county court.

(10) Any person deriving any benefit from any moneys invested in a Post Office Savings Bank under the provisions of this Act may, nevertheless, open an account in a Post Office Savings Bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an

A.D. 1897.

examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(13) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first subsection of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

59 & 60 Vict. c. 25.

(16) In the application of this schedule to Scotland, the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

(17) In the Application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

40 & 41 Vict. c. 56.

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Section 1.

## SECOND SCHEDULE.

### Arbitration.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration :—

(1) If any committee, representative of an employer and his workmen,

exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided. A.D. 1897.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

(4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court. 52 & 53 Vict. c. 39.

(5) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7) In the case of the death or refusal or inability to act of an arbitrator, a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

(8) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special

A.D. 1897.

register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9) Where any matter under this Act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorizes rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

51 & 52 Vict. c. 43.

(11) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14) In the application of this schedule to Scotland—

(*a*) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court":

(*b*) Any award or agreement as to compensation under this Act may

be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral: A.D. 1897.

(*c*) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced. 39 & 40 Vict. c. 70.

(15) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

# INDEX.

ABOUT. *See* ON, IN OR ABOUT.

ACCIDENT,
lead-poisoning, 123

ACTION,
alternative for arbitration, 32

AGRICULTURAL WORKMEN, 137

ANSWER,
procedure, where none, 120

APPEAL TO THE COURT OF APPEAL
security for costs, 114–119

ARBITRATION,
subsequent to action, 32
new trial, 110
procedure, where no answer, 120
County Court Judge, position of, 110
costs of attending, 151

ARISING OUT OF AND IN THE COURSE OF, 1–18
act done not in master's interest, 1
disobedience to orders, 5
acting for master's benefit, 9
scope of employment, 9, 11
acting on emergency, 9
saving life, 124
going to work, 83
on master's premises, 13

ASSESSMENT OF COMPENSATION, 19, *et seq.* 32
where no present loss, 19, 26
pain and suffering, 26

AVERAGE WEEKLY EARNINGS,
calculation of, 94–109, 142

BUILDING,
constructed by machinery on another building, 80
height of, 57, 59, 62

BUILDINGS,
classification of, 57
construction or repair of, 62

CHAFF-CUTTER, 137, 138

COMPENSATION. *See* ASSESSMENT OF COMPENSATION.

CONSTRUCTED OR REPAIRED. *See* BUILDINGS.

COSTS OF UNSUCCESSFUL ACTION, 35
assessment of compensation after action, 35
attending arbitration, 151
security for, in Court of Appeal, 114–119

COUNTY COURT JUDGE SITS AS ARBITRATOR, 110

COURSE OF EMPLOYMENT,
implication, 80
*See* ARISING OUT OF.

DEPENDENT,
meaning of, 89, 92

DISABLEMENT,
work at which he was employed, 19

DISOBEDIENCE,
course of employment, 5, 11

DOCK, SHIP IN. *See* SHIP IN DOCK.

EARNINGS,
how calculated, 94–109, 142
rate of, may be implied, 142

EMERGENCY,
acting on. *See* ARISING OUT OF.

EMPLOYED,
work at which he was, 19

ENGINEERING WORK, 138, 141
any other work, 138

ENGINEERING WORK—*continued.*
other mechanical power, 138, 141
meaning of machinery, 138
sewer, meaning of, 138
on, in or about, 47

FACTORY,
chaff-cutter, 137
threshing-machines, 138

HEIGHT OF BUILDING, 57, 59, 62

INDEMNITY,
notice of claim of, 103

INSURANCE POLICY,
stamp duty, 38

JUDGE OF COUNTY COURT SITS AS ARBITRATOR, 110

LETTERS OF ADMINISTRATION,
necessity for, 147, 152

MACHINERY,
unloading ship, 52
pulley, 138
used in one building for constructing another, 80

MECHANICAL POWER, 138, 141

MISCONDUCT. *See* SERIOUS AND WILFUL.

NEW TRIAL, 110

ON, IN OR ABOUT, 44–56
engineering work, 47
dock, ship in, 51, 52, 76, 78

PAIN AND SUFFERING,
compensation for, 26

PAYMENT,
to whom, 147

PLANT USED IN LOADING SHIP,
gangway doors, 76

POLICY OF INSURANCE,
stamp duty, 38

QUAY,
when within act, 73

REPAIR,
painting, 68

SCAFFOLDING,
meaning of, 62, 68, 133

SCOPE OF EMPLOYMENT. *See* COURSE OF EMPLOYMENT.

SECURITY FOR COSTS OF APPEAL, 114–119

SERIOUS AND WILFUL MISCONDUCT,
meaning of, 28, 5, 9, 129

SEWER,
meaning of, 138

SHIP IN DOCK, 51, 52
staging on outside of, 78
unloading, hydraulic crane, 52

WAREHOUSE,
when within act, 73

WEEKLY EARNINGS,
calculation of, 94–109, 142
rate of, may be implied, 142

WHARF,
when within act, 73

WORK AT WHICH HE WAS EMPLOYED, 19

THE END.

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# WORKMEN'S COMPENSATION CASES.

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# WORKMEN'S COMPENSATION CASES:

BEING

## REPORTS OF CASES

DECIDED UNDER THE

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PRINCIPALLY TAKEN FROM THE

## TIMES LAW REPORTS.

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# PREFACE.

ALMOST as soon as the first volume of these Reports made its appearance in the autumn of last year, suggestions were made that the Reports should be issued in periodical numbers. For one reason or another that could not be done. The call for the cases decided during the past twelve months was, however, imperative. Hence the publication of Volume II. of Workmen's Compensation Cases.

There are fifty cases reported in this volume. Twenty-four of them do not appear in either "The Law Reports" or "The Law Journal Reports," while a considerable number are not elsewhere reported.

The judgments in the form appearing in "The Law Reports" are sometimes the more useful because the Judges revise and correct them. Application was made to the Council of Law Reporting for their sanction to reproduce

those judgments in these Reports, and it is to be regretted that it was refused.

The cross references refer only to the English cases. Scotch cases (there are none in the Irish Law Reports) are cited in "The Case Law of the Workmen's Compensation Act, 1897," 2nd Edition.

THE EDITOR.

*October*, 1900.

# TABLE OF CASES.


| | PAGE |
|---|---|
| ADSHEAD, Johnson *v.* . . . . | 158 |
| Atlantic Transport Co., Lawson *v.* . . . . . | 53 |
| BAGNALL, Wright *v.* . . . . | 36 |
| Bailey *v.* Plant . . . . . | 160 |
| Bedworth Coal and Iron Co., Bradbury *v.* . . . . . | 138 |
| Bradbury *v.* Bedworth Coal and Iron Co. . . . . | 138 |
| Brook, Maude *v.* . . . . . | 69 |
| Butler, Cass *v.* . . . . . | 87 |
| CASS *v.* Butler . . . . . | 87 |
| Charnley, Herron *v.* . . . . | 24 |
| Cooper *v.* Davenport . . . | 44 |
| Cord Taton Co., Smith *v.* . . | 121 |
| Crossfield *v.* Tanion . . . | 141 |
| DANIEL *v.* Ocean Coal Co. . | 135 |
| Davenport, Cooper *v.* . . . . | 44 |
| Davies *v.* Main Colliery Co. . | 108 |
| Davies *v.* Rhymney Iron Co. | 22 |
| Dean, Mason *v.* . . . . . | 91 |
| Douglas *v.* United Mineral Mining Co. . . . . | 15 |
| ELLIS *v.* Knott . . . . . | 116 |
| FENN *v.* Miller . . . . . | 55 |
| Fenton, Frid *v.* . . . . . | 66 |
| Fisher, Haddock *v.* . . . . . | 43 |
| Francis *v.* Turner . . . . | 61 |
| Frid *v.* Fenton . . . . . | 66 |
| GALLOWAYS, Statham *v.* . . . | 149 |
| Garner, Percival *v.* . . . . . | 99 |
| Great Northern Ry., Holmes *v.* | 19 |
| Great Northern Ry., Milner *v.* | 51 |
| Great Western Ry., Welland *v.* . . . . . | 145 |
| HADDOCK *v.* Fisher . . . . | 43 |
| Haddock *v.* Humphrey . . | 77 |
| Harrison *v.* Whitaker . . . | 12 |
| Hennessey *v.* McCabe . . . | 80 |
| Hensey *v.* White . . . . | 1 |
| Hepburn, Hewlett *v.* . . . . | 123 |
| Herron *v.* Charnley . . . | 24 |
| Hewlett *v.* Hepburn . . . | 123 |
| Hill's Dry Dock Co., Rendall *v.* | 40 |
| Holme, Russell *v.* . . . . . | 153 |
| Holmes *v.* Great Northern Ry. | 19 |
| Humphrey, Haddock *v.* . . . | 77 |
| ILLINGWORTH *v.* Walmsley . | 118 |
| JOHNSON *v.* Adshead . . . | 158 |
| KNOTT, Ellis *v.* . . . . . | 116 |
| Knowles, Lysons *v.* . . . . | 101 |
| LAMBTON Collieries Ltd., Turnbull *v.* . . . . . | 84 |
| Lawson *v.* Atlantic Transport Co. . . . . | 53 |
| Leeds Forge Co., Timmins *v.* | 10 |
| Lilleshall Coal Co., Walker *v.* | 7 |
| Livett, Spencer *v.* . . . . . | 112 |

PAGE
Lloyd *v.* Sugg . . . . . 5
London and South Western Ry., Pearce *v.* . . . . . 47, 152
Lysons *v.* Knowles . . . . 101

McCabe, Hennessey *v.* . . . 80
Main Colliery Co., Davies *v.* . 108
Main Colliery Co., Powell *v.* 25, 29
Mason *v.* Dean . . . . . 91
Maude *v.* Brook . . . . . 69
Miller, Fenn *v.* . . . . . 55
Milner *v.* Great Northern Ry. 51
Moore, Stead *v.* . . . . . 96

Nixon, Stuart *v.* . . . . . 104

Ocean Coal Co., Daniel *v.* . 135
Osborn *v.* Vickers & Maxim . 130

Pattinson *v.* Stevenson . . 156
Pearce *v.* London and South Western Ry. . . . . 47, 152
Percival *v.* Garner . . . . 99
Plant, Bailey *v.* . . . . . 160
Poulson, Williams *v.* . . . 126
Powell *v.* Main Colliery Co. 25, 29
Pritchard & Renwick, Rixsom *v.* . . . . . 65

Rendall *v.* Hill's Dry Dock Co. . . . . 40
Rhymney Iron Co., Davies *v.* 22

PAGE
Rixsom *v.* Pritchard & Renwick . . . . . 65
Russell *v.* Holme . . . . 153

Smith *v.* Cord Taton Co. . . 121
Spencer *v.* Livett . . . . 112
Statham *v.* Galloways . . . 149
Stead *v.* Moore . . . . . 96
Stevenson, Pattinson *v.* . . 156
Stuart *v.* Nixon . . . . . 104
Sugg, Lloyd *v.* . . . . . 5

Tanion, Crossfield *v.* . . . 141
Timmins *v.* Leeds Forge Co. 10
Turnbull *v.* Lambton Collieries Ltd. . . . . 84
Turner, Francis *v.* . . . . 61

United Mineral Mining Co., Douglas *v.* . . . . . 15

Vickers & Maxim, Osborn *v.* 130

Walker *v.* Lilleshall Coal Co. 7
Walmsley, Illingworth *v.* . . 118
Welland *v.* Great Western Ry. . . . . 145
Whitaker, Harrison *v.* . . . 12
White, Hensey *v.* . . . . 1
Williams *v.* Poulson . . . 126
Wright *v.* Bagnall . . . . 36

# CASES

DETERMINED BY

# THE COURT OF APPEAL

ON APPEAL FROM THE COUNTY COURT.

AUGUST, 1899, TO AUGUST, 1900.

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## HENSEY *v.* WHITE.

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 64.

*Accident.*—SEC. 1, 1.

The word "accident" involves the idea of something fortuitous and unexpected. A man who was not in a sound condition of health injured himself when doing his ordinary work which was somewhat harder than usual.

*Held* that there was evidence that the injury was not caused by accident.

THIS was an appeal from the decision of the County Court Judge of Bedford (Judge Bagshawe, Q.C.) in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The only question was whether the death of the workman was caused by an accident, the Act only applying where there was personal injury by accident to a workman. The appellant was the widow of a cabinetmaker named

Charles Hensey, who at the time of his death was in the employment of the respondent. It appeared that the workmen had to begin their work in the morning by starting a gas engine. Upon the first day after the Christmas holidays, 1898, when the workmen resumed work, Hensey and three other men proceeded to light the gas in the engine and to start the engine. In order to start the engine it was necessary to turn a large wheel. Hensey proceeded to attempt to hoist the wheel, the three other men pulling it down on the other side. Owing to the lapse of time since the engine was last used, air had got into the engine, and the wheel would not move at first. The men made a second attempt and they succeeded in moving the wheel, when Hensey suddenly put his hand to his stomach and left the place. He was found immediately afterwards vomiting blood, and he bled to death. Death was caused by rupture of the small blood-vessels of the stomach and intestines. The deceased man had been employed on the work for several years. A *post-mortem* examination was made, and the medical evidence showed that the deceased man had been suffering from chronic indigestion, which had weakened the blood-vessels of the stomach and intestines, and there was evidence of congestion and inflammation. Two of the doctors gave it as their opinion that the rupture of the blood-vessels was caused by the strain, whereas another doctor stated his opinion that the strain apart from the disease did not cause the blood-vessels to give way, and that, in his opinion, hæmorrhage of the stomach could not result from strain without disease. The County Court Judge found that to make it an accident there must be something happening beyond the mere fact of a disease suddenly taking a fatal turn—*e.g.* some break in the machinery, some fall of the workman, or something else out of the ordinary and normal course of the workman's employment. It was not enough that ordinary hard work, carried on by the workman in the manner intended, had, as he worked, suddenly caused his disease to take a fatal form. He found as a fact that the deceased man had been long

suffering from chronic inflammation of the internal coat of the stomach, caused or accompanied by congestion of the numerous small blood-vessels in that coat, that there was an exudation of blood from the stomach which caused death, and that this was the result of the congestion and chronic inflammation of the stomach, and would not have happened without it. He accordingly decided in favour of the respondent.

Mr. *Montague Shearman*, for the appellant, contended that the actual and immediate cause which produced death could alone be looked at. The predisposing cause of death could not be looked at. The County Court Judge really only found that without the disease the strain would not have caused death. That was not a finding that the disease was the proximate cause of the death. The strain was the proximate cause, and that was an accident. He referred to *Winspear* v. *Accident Insurance Company* (6 Q. B. D. 42); *Lawrence* v. *Accidental Insurance Company* (7 Q. B. D. 216); *Hamlyn* v. *Crown Accidental Insurance Company* ([1893] 1 Q. B. 750).

Mr. *E. Morten*, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether, upon the findings of the County Court Judge, the death of the workman was caused by accident. The man was at his ordinary work and the wheel of the gas engine had to be started. The wheel happened to be rather stiff, and there was some difficulty in starting it. When attempting to start the wheel the deceased man suddenly put his hand to his stomach and left the place, and he died from the bursting of blood-vessels in his stomach. Upon the *post-mortem* examination it was found that the stomach was not at all in a sound condition. Medical evidence was given on both sides as to the man's condition, and the Judge upon the evidence found that the death was caused by disease, and that the rupture of the blood-vessels was probably caused by the man's ordinary work, though upon the occasion in

question the work was a little more arduous than usual. The Judge came to the conclusion that the disease and not an accident caused the death. They could not interfere with that finding of fact. The present case in no way infringed upon any of the cases cited. The appeal must therefore be dismissed.

LORD JUSTICE COLLINS concurred. It was clear on the findings of the County Court Judge that the element of accident was entirely wanting. The injury arose in the ordinary course of the deceased man's work, though there might have been a little more exertion used by him in that work on the occasion in question than was usual. In *Pandorf* v. *Hamilton* (12 App. Cas. 518, at p. 524) Lord Halsbury said that he thought that the idea of something fortuitous and unexpected was involved in the word "accident." That element was wanting in the present case. In the cases which had been cited a fortuitous and unexpected element existed which was the proximate and ultimate cause of death.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

Solicitors: *Purkis & Co., for the appellant; Halliley & Stimson, for the respondent.*

Also reported in (1900) 1 Q. B. 481; 69 L. J. Q. B. 188; 81 L. T. 767; 48 W. R. 257; 63 J. P. 804; 16 T. L. R. 64.

Consult "Accidents to Workmen" and cases (*post*).

## LLOYD *v.* SUGG AND CO. (LIMITED).

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 65.

*Accident.*—SEC. 1, 1.

An injury may be caused by an accident although no injury would have been thereby suffered but for the existence of a disease which was aggravated by the accident.

THIS was an appeal from the decision of the Westminster County Court Judge (Judge Lumley Smith, Q.C.) in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, George Lloyd, was a smith in the employment of the appellants at their engineering works at Westminster. The respondent was at the time of the accident holding a flatter on the anvil for another workman, called a hammerer, to strike the flat end of the flatter, when the hammerer by accident struck the rod or round part of the flatter and jarred the respondent's hand. In consequence the hand became swollen, and gout in the hand was brought on. The doctor who attended the respondent, and who was called as a witness by the appellants, said that he had attended the respondent previously to the accident for gout in the hand and elbow, that the respondent had gouty diathesis, and that he thought the swollen hand was caused by gout brought on by the jar. The doctor's certificate stated that the respondent was suffering from a weak hand caused partially by the injury. The County Court Judge awarded the respondent 15*s.* a week, stating that the respondent came within the Act.

Mr. *Spencer Bower*, for the appellants, contended that the injury to the hand was not caused by the accident. There was no evidence that the injury was solely caused by the accident. The gout was the cause of the swollen hand.

Mr. *Duckworth*, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that he desired to say that, as these appeals were solely upon questions of law and not upon questions of fact, it would be a great assistance to the Court if County Court Judges would certify particularly what their findings of fact were. In the present case the County Court Judge had only reported at the end of his notes that he awarded the respondent 15*s*. a week, but the Court were told that he further said that the respondent came within the Act. The point now taken was that there was no evidence that the injury was solely caused by the accident. The evidence showed that the mis-hit by the hammerer jarred the respondent's hand. That mis-hit was an accident, and if it had broken the hand the case would have admittedly been within the Act. It was said that the injury to the hand was caused by the gout and not by the accident. The doctor's certificate stated that the respondent was suffering from a weak hand caused partially by the injury. Any one might have a weak hand. Was it to be said that in such a case as this only those with cast-iron hands came within the Act? The present case seemed to him to be a perfectly clear case. The injury to the hand was caused by an accident, and the Act applied.

LORD JUSTICE COLLINS concurred. The case was a clear one. There was a jar to the workman's hand brought about by the hammerer hitting the rod and not the flat end of the flatter. The essential element of an accident causing injury existed. The Court must assume that the County Court Judge decided every question of fact necessary to support his decision in favour of the workman. It was urged in effect that the injury supervening upon the jar would not have been nearly so great had it not been for the gout. That seemed to him to be immaterial. There was the accident and the consequent injury, and the extent of the injury must depend upon the condition or the constitution of the person injured at the time of the accident. The principle

always followed in cases where compensation had to be assessed for personal injuries caused by negligence, so far as related to the causes contributing to the disability, must be applied in cases under the Act of 1897. Take, for instance, the case of a delicate lady receiving a shock in a railway accident. The injury would be much greater to her than in the case of a lady in perfect health. In each case the Court had to deal with the then existing condition of the injured person to arrive at the ultimate result.

LORD JUSTICE VAUGHAN WILLIAMS agreed.

Solicitors—*Wynne Baxter and Keeble, for the appellants; A. Slater, for the respondent.*

Also reported in (1900) 1 Q. B. 481; 69 L. J. Q. B. 190; 81 L. T. 768; 48 W. R. 257; 16 T. L. R. 65.

Consult "Accidents to Workmen," *Hensey* v. *White* (*ante*, p. 1); and cases there referred to.

---

## WALKER *v.* LILLESHALL COAL COMPANY (LIMITED).

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 108.

*Accident.*—SEC. 1, 1.

An injury caused to an imperfect physical condition while working in the ordinary way with the usual materials and appliances is not an injury by accident. Therefore, where an engine-fitter was fixing steampipe joints for which purpose red lead was used, and in consequence of a blister on his finger the red lead poisoned the finger, it was *held* that the injury was not caused by an "accident."

THIS was an appeal from the decision of the Judge of the Bow County Court (Judge French, Q.C.), in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was an engine-fitter in the employment of the respondents, who were engineers and ironfounders.

The appellant on April 17, 1899, was working for the respondents at the Abbey Mills, West Ham, fixing some machinery there. He was working at steam pipe joints for a machine, it being the duty of a labourer to put red lead on the joints, the appellant having then to screw the pipes into position. The appellant had in the previous week blistered one of the fingers of his right hand while chipping steel plates for a large engine at the same works. On the day of the accident the appellant showed the blister to the foreman and said that he thought it was hardly fit for him to do the job. The foreman replied that he must do it, as the engine had to work that afternoon. The appellant accordingly did the work. The next night the finger became inflamed from the red lead and oil, and was seriously injured. The County Court Judge said that the appellant had received a serious injury whilst working in the respondents' employment in the ordinary way with the usual materials and appliances, and that there was no accident within the meaning of the Act of 1897. He accordingly decided in favour of the respondents.

Mr. *Bassett Hopkins* appeared for the appellant.

Mr. *T. W. Chitty*, for the respondents, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that to bring a case within the Act there must be, by sec. 1, subsec. 1, personal injury by accident arising out of and in the course of the employment. The sole question here was whether there had been an accident. The personal injury was beyond question. But it arose when the workman was working in the ordinary way and with the usual materials. There were two cases, decided a fortnight ago, in which a similar question arose. In *Hensey* v. *White* (*ante*, p. 1) the workman was suffering from chronic inflammation of the stomach, which caused the blood-vessels to become congested, and the man died through the bursting of the blood-vessels while at his ordinary work, though at the time of his death the work was more arduous than usual. The County Court Judge found as a fact that the man died

of inherent weakness of the blood-vessels and not from an accident, and this Court dismissed the appeal. Lord Justice Collins in that case said that "it was clear on the findings of the County Court Judge that the element of accident was entirely wanting. The injury arose in the ordinary course of the deceased man's work, though there might have been a little more exertion used by him in that work on the occasion in question than was usual. In *Pandorf* v. *Hamilton* (12 App. Cas. 518, at p. 524) Lord Halsbury said that he thought that the idea of something fortuitous and unexpected was involved in the word 'accident.' That element was wanting in the present case. In the cases which had been cited a fortuitous and unexpected element existed which was the proximate and ultimate cause of death." He (the Lord Justice) entirely agreed with that view. The next case was *Lloyd* v. *Sugg & Co.* (*ante*, p. 5), where the workman was holding a flatter on an anvil for another man to hit. The duty of the latter man was to hit the flat end of the flatter, but he struck the round part and jarred the other workman's hand. That was an injury caused by a mis-hit, and was therefore an accident. In his Lordship's opinion there was no accident in the present case.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS agreed.

Solicitors: *Edward Clarke, for the appellant; Hargreave & Heaton, for the respondents.*

Also reported in (1900) 2 Q. B. 481; 69 L. J. Q. B. 192; 81 L. T. 769; 48 W. R. 257; 64 J. P. 85; 16 T. L. R. 108.

Consult "Accidents to Workmen," *Hensey* v. *White* (*ante*, p. 1); and cases there referred to.

## TIMMINS *v.* THE LEEDS FORGE COMPANY (LIMITED).

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 521.

*Accident.*—SEC. 1, 1.

A man was employed in moving heavy planks from one pile to another. During the night the planks were all frozen together so that there was some difficulty in separating them. The lower planks in the pile were more firmly stuck together than those above, but the man was not aware of this. The man sustained an injury owing to the difficulty of moving one of the lower planks.

*Held* that there was evidence of an accident.

THIS was an appeal from the decision of Judge Greenhow, sitting at the Leeds County Court, under the Workmen's Compensation Act, 1897. The applicant for compensation was a labourer in the employment of the Leeds Forge Company. The question was whether the injury to the workman was caused by an "accident." The appeal first came before the Court on February 3 last, when it was remitted to the County Court Judge to find the exact circumstances in which the injury occurred. The case now came on again. The evidence was shortly as follows:—The applicant's duty was to lift planks of timber. On January 26, 1899, he was engaged in shifting timber from one heap in the yard to another heap. He had been moving the timber the day before, and had no difficulty in moving it then. The timber consisted of pine deals, 14 ft. long, 11 in. wide, and 3 in. thick. On January 26 the planks were all frozen together, there having been a frost during the night. The applicant began work at 11 a.m. and had a difficulty in moving the planks from the beginning. At about 4.15 p.m. he bent down to lift a plank which was fast to some others with the frost,

when he fell down in pain. The lower planks in the heap were more firmly fastened together on account of the rain and frost. He never had any difficulty before that occasion. The applicant was ruptured in consequence, and was injured. The County Court Judge found the above evidence to be true. It appeared that the applicant had been previously ruptured, but the County Court Judge found upon the evidence that he was practically cured of the old rupture, and was as good a man as he was before it, and was entitled to the same remedy as if this had been a rupture for the first time. The Judge also found that the rupture was, in fact, caused by the lifting of the timber and not by some other cause, and that it was, under all the circumstances of the case, an injury by accident arising out of and in the course of the employment, and that the employers were liable to pay compensation. He accordingly made an award in favour of the applicant.

Mr. *Bairstow* (Mr. *Cripps*, Q.C., with him), for the employers, contended that there was no "accident" in this case. There was nothing fortuitous or unexpected. The workman knew that the planks were frozen together, as he had been working from 11 a.m. to 4.15 p.m. when the accident happened. The work was the man's ordinary work which was rendered heavier than usual by the frost. He referred to *Hensey* v. *White* (*ante*, p. 1).

Mr. *Tindal Atkinson*, Q.C., and Mr. *Compston*, for the applicant, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the facts shortly were that the workman was engaged in moving piles of timber. There had been rain and frost the night before, and in consequence the planks got frozen together. The man found that he was able to move the timber. As he (the Lord Justice) read the evidence, the lower down the workman got in the stack of timber the harder the planks stuck together, owing to the rain and frost, and this was unknown to the workman. Accordingly when the workman tried to lift one of the lower planks he ruptured himself, owing to the

difficulty of lifting it, on account of its being frozen fast to the other planks. It was said that there was nothing fortuitous or unexpected in the case. In his opinion, there was evidence upon which the County Court Judge could find that the injury was caused by something fortuitous and unexpected by reason of the planks sticking together. The appeal, therefore, failed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Solicitors: *Leslie Field, for Day & Yewdall, Leeds, for the appellants; Scott, Lawson, & Parker, for A. Willey, Leeds, for the respondent.*

Also reported in 16 T. L. R. 521.
Consult *Hensey* v. *White* (*ante*, p. 1); and cases there referred to.

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## HARRISON *v.* WHITAKER BROTHERS (LIMITED).

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 108.

*Arising out of and in the Course of.*—SEC. 1, 1.

A boy was employed to grease the wheels and axles of railway trucks. While waiting for trucks to come up he thought the points were against the engine, and began to pull the lever in order to open them, and was injured.

*Held* that there was evidence of an accident arising out of and in the course of his employment.

THIS was an appeal from the decision of the Hull County Court Judge (Judge Raikes, Q.C.) in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, a boy of 15 years of age, was in the employment of the appellants, who were contractors in a large way of business, and who at the time of the accident were engaged in constructing a dock at Hull. There was a

railway line used and worked by them for the construction of the dock. The respondent had been employed by the appellants as a signaler, but at the time of the accident he was employed to grease the wheels and axles of the railway trucks. On October 15, 1898, he had finished greasing all the trucks that were ready for him, and had to wait for more trucks. He went to a fire which was a short distance away from the place where he had been greasing the trucks, the fire being close to a lever used for moving points. All trucks coming to him would pass by that spot. The handle of the lever was away from the line, and the respondent sat on the handle to warm himself at the fire. He saw an engine with trucks coming along the line, up an incline, and, thinking that the points were against the engine, he began to pull the lever over to open them, when the engine came up and took the lever over with a jerk, the lever throwing him against the engine. He was so injured that his leg had to be amputated. The lever was an automatic one, and there was evidence that the points had been left so that the engine would have opened them. The respondent had not been told not to touch the lever, but it was no part of his duty to do so. There was a boy whose duty it was to took after the points, but he was about twenty yards away at the time. The questions were (1) whether the accident arose "out of and in the course of the employment" within sec. 1, sub-sec. 1, of the Act of 1897; and (2) whether the injury was attributable to the serious and wilful misconduct of the respondent. The County Court Judge found in favour of the respondent. He said that the respondent was not neglecting any duty at the time of the accident; that he was only waiting for more trucks to come to be greased, and he was under no obligation to stay or stand in any particular place until the trucks arrived; and that he was in the course of his employment when the accident happened. He also held that the respondent was not guilty of serious and wilful misconduct.

Mr. *W. H. Owen* appeared for the appellants.

Mr. *H. T. Kemp*, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the boy was engaged on the day of the accident in greasing the wheels of the trucks. He had greased all the trucks that were ready for him, and he had then to wait for others. What was he to do while waiting? There was a fire not far from the place where he had greased the trucks, and he sat down on a lever to warm himself by it. The County Court Judge came to the conclusion upon the evidence that the story told by the boy was true. An engine and trucks came along the line, and the boy was thrown against the engine and injured. The only question they had to decide was whether there was evidence upon which the County Court Judge could find that the accident arose out of and in the course of the boy's employment. It was the boy's duty to wait for the other trucks. In his Lordship's opinion there was evidence to justify the finding of the Judge. He would go further and say that he thought the County Court Judge was right. Again, upon the evidence the Judge was justified in finding that there was no serious and wilful misconduct.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS concurred.

Solicitors: *W. Roberts, Hull, for the appellants; A. M. Jackson & Co., Hull, for the respondent.*

Also reported 64 J. P. 54; 16 T. L. R. 108.

Consult (1899) 1 W. C. C. 1 *et seq.*; also *post*; and *Pearce* v. *London & South Western Railway* (*post*, p. 152).

# DOUGLAS *v.* UNITED MINERAL MINING COMPANY (LIMITED).

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

*The Times, February* 20, 1900.

*Arising out of and in the Course of—Serious and Wilful Misconduct.*—SEC. 1, 1 and 2 (*c*).

The proper and safer way to proceed from a lower to a higher level of a mine was by a ladder, though the miners habitually used a sump shaft provided for raising metals. At the time of the accident a miner was leaving by way of the sump shaft.

*Held* that there was evidence that the accident arose out of and in the course of his employment, and was not due to serious and wilful misconduct.

THIS was an appeal from the award of Sir Horatio Lloyd, the Judge of the Wrexham County Court, under the Workmen's Compensation Act, 1897. The respondent was the widow of a miner, who at the time of the accident causing his death was in the employment of the appellants, the United Mineral Mining Company, at their lead mine, and she claimed compensation under the Act on behalf of herself and her six children. On Saturday, April 15, 1899, the deceased man was working in the 340 yards' level in the mine. The way for the men to get from the 340 level to the upper level, the 351 yards' level, was by a ladder. There was also a "sump" shaft with a cage working in it leading from one level to the other, used for raising the lead ore from the lower to the higher level. The cage was worked by an engine on the 315 level, some way from the top of the shaft, so that the man whose duty it was to work the engine could not see the bottom of the sump shaft. The evidence showed that it was dangerous for the men to go up or down

by the sump shaft on account of the engineman not being able to see the bottom of the shaft, and because there was no indicator on the engine to tell the engineman the position of the cage in the shaft. It was known to the men working in the 340 level that the sump shaft was not the proper way to descend to and ascend from the 340 level, but there was no notice posted up in the mine prohibiting them from going up or down the shaft. It appeared from the evidence that the men frequently did so, though they did not do so when any of the mine officials were present. The engineman was ordered not to wind the men up the sump shaft. The engineman usually left off work after winding up the lead ore, and then the miners would leave work. Frequently one of them would ascend by the ladder and then wind the rest of the men up the sump shaft by means of the engine. Upon the day in question the men were leaving the mine at 1.30 p.m., and the deceased man called out to a boy to wind him up the sump shaft, but the boy refused to do so, saying that he would only wind up the tools. The deceased man then called out, "Go on, then," and the boy started the engine to wind up, as he thought, the tools, and when the cage was near the top the deceased man, who was in the cage, called out "Higher up." The boy did not know until then that the deceased man was in the cage and he became confused and pulled the wrong lever of the engine, with the result that the engine got out of gear, and the cage fell down the shaft, and the man was killed. The County Court Judge found that the accident arose out of, and in the course of, the deceased man's employment, and that the deceased man was not guilty of serious and wilful misconduct. He said that he thought that the evidence clearly showed that it was a recognized custom for the men to go down the sump shaft, and this appeared to have been known to the officials in the mine; that the men were not distinctly told to go by the ladder, and not to go down by the shaft, and that the men habitually used the sump shaft. He accordingly made an award in favour of the respondent for £241 16*s*.

Mr. *Ruegg*, Q.C., and Mr. *Bryn-Roberts*, for the appellants, contended that though the accident arose "in the course of" the deceased man's employment, yet it did not arise "out of" the employment. The men had a way provided for them by which to leave the mine, and the deceased man deliberately tried to get out by a way which was not permitted, merely because it was a shorter and easier way than by the ladder. Secondly, the accident was attributable to the serious and wilful misconduct of the deceased man. The deliberate breaking of a rule of the mine established for the safety of the men working in the particular level was serious and wilful misconduct. Though the rule was frequently broken by the men, it was never broken when any of the mine officials were present, and therefore it could not be said that the breach of the rule was winked at by the officials. *McNicholas* v. *Dawson* (1899, 1 W. C. C. 80) was referred to.

Mr. *C. A. Russell*, Q.C., Mr. *Samuel Moss*, and Mr. *T. E. Morris*, for the respondent, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was a case which the Legislature never intended to be brought to this Court, because it was a question of fact and not of law. The claimant for compensation had to make out that the accident arose out of and in the course of the deceased man's employment. It was the duty of the deceased man to go down to the 340 level, and when he had finished his work to leave that level and go out of the mine. The accident occurred when the deceased man was going out of the mine. If that stood alone it was clear that the accident arose out of and in the course of the employment. It was said that the deceased man went up by the sump shaft, and not by the ladder. Did the fact that the deceased man went out by a wrong way prevent the accident from arising out of and in the course of his employment? The County Court Judge upon the evidence found that the sump shaft was not the proper way for the men to ascend or descend by; but he also found that it was habitually used by them, and that it was a recognized

custom that they should do so. There was plenty of evidence upon which the County Court Judge could find that the accident arose out of and in the course of the employment. That being so, the only way in which the employers could escape liability to pay compensation under the Act was by showing that the accident was attributable to the serious and wilful misconduct of the deceased man. The County Court Judge found that the sump shaft was habitually used by the men. It was said that the employers did not know that. How could this Court say, when the shaft was habitually so used, that there was no evidence upon which the Judge was entitled to find that the accident was not attributable to the serious and wilful misconduct of the deceased man? It was a mere question of fact, and there was no law in it at all. The appeal must therefore be dismissed.

LORD JUSTICE COLLINS concurred. As regards the question of serious and wilful misconduct, there was evidence both ways, and he (the Lord Justice) would not have interfered if the County Court Judge had found the other way. It was a question of fact upon which there was evidence to justify the finding of the Judge.

LORD JUSTICE ROMER concurred. Upon the question whether the accident arose out of and in the course of the employment, he would refer to the language of Lord Cranworth in "*Brydon* v. *Stewart*" (2 Macqueen, H. L. 30), where he said, at page 35:—"I quite adopt the argument of the Solicitor-General that a master is only responsible while the servant is engaged in his employment; but then we must take a great latitude in the construction of the phrase 'being engaged in his employ.'" And at page 36 he said:—"Whatever the man does in the course of his master's employ, according to the fair interpretation of these words, *eundo, morando, redeundo,* the master is responsible; and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse or proper cause for leaving their work."

Also reported in *The Times*, February 20, 1900.

Consult *Harrison* v. *Whitaker* (*ante*, p. 12); and cases there referred to.

## HOLMES *v.* GREAT NORTHERN RAILWAY COMPANY.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 412.

*Arising out of and in the Course of.*—SEC. 1, 1.

An engine-cleaner, who lived at King's Cross, was carried free by his employers, a railway company, to Hornsey. While crossing the metals for the purpose of getting to the place where he worked, and shortly before the time for commencing work, he was knocked down by a passing train and killed.

*Held* that the employment commenced when he entered the train at King's Cross, and that the accident arose out of and in the course of his employment.

THIS was an appeal from an award of the Judge of the Clerkenwell County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was the mother of a workman who had died in consequence of accidental injury sustained by him in the course of his employment. The deceased workman was an engine-cleaner in the employment of the Great Northern Railway Company, and up to Saturday, November 4, 1899, he was engaged on work at King's Cross. A new engine-shed having been erected by the company at Hornsey, about four miles from King's Cross, the deceased was directed by his foreman to go there on the following Monday, November 6, for the purpose of cleaning the engines in the new shed. No particular instructions were given him by the foreman as to how he was to get to Hornsey, but, as he lived near King's Cross, he travelled by one of the company's trains from there to Hornsey. His time for beginning work was 6 a.m., and he arrived at Hornsey about 5.45 a.m. Not knowing where the engine-shed was, he went in a wrong direction, but on inquiry was shown a way which was not the most direct. He,

however, reached the engine-shed and did his day's work. It did not appear by what way he returned home that evening. On the following morning, Tuesday, November 7, he and some other men, who were also engine-cleaners, proceeded from King's Cross to Hornsey as before, and reached the latter place at 5.45. None of them had tickets, and it did not appear that they would be expected to take tickets, and in fact they were not asked for them. On arriving at Hornsey the deceased and the other men proceeded to cross the lines of railway in front of the engine, which was then blowing off steam, when an express train coming from King's Cross on the main line caught him and injured him so much that he died on the following day. It appeared that there was a foot-bridge across the lines, and also a subway, by either of which the deceased might have proceeded to the other side, but he and the others crossed the lines on the level, as being the shortest way. The sole contention raised on behalf of the employers was that the injury to the deceased did not arise out of and in the course of his employment, and the case of *Holness* v. *Mackay* ([1899] 1 W. C. C. 13) was relied on to show that the employment did not commence until the hour of actual work had arrived, and the deceased was upon that part of the employers' premises where such work was to be performed. The County Court Judge was of opinion that the accident arose out of and in the course of the deceased man's employment—viz. whilst he was carrying out the orders of his superior officer, and proceeding to the particular place upon his employers' premises where he was directed to go. He accordingly made an award in favour of the applicant for £150. The employers appealed.

Mr. *Montague Lush* and Mr. *A. Clutton Brock* appeared for the employers, and contended that the accident did not arise out of and in the course of the deceased's employment. He was not crossing the line for purposes of his masters. He was not under an obligation to cross the line at all. He selected a dangerous route, when he had the alternative of two safe ones. His employment did not begin till he reached the

engine-shed. He might have gone by any train he liked. While he was travelling by train, and until he reached the shed, he was his own master, and he was not acting as the servant of the company at all.

Mr. *W. H. Duckworth* appeared for the applicant.

The COURT, without calling upon counsel for the applicant, dismissed the appeal.

LORD JUSTICE A. L. SMITH said the only question the Court had to consider was whether there was any evidence to support the conclusion of the County Court Judge that this accident arose out of and in the course of the deceased's employment. It seemed to him that there was an implied contract between the masters and the man that if he would get into a train at King's Cross they would take him by their line to his work and bring him back again. There was a difference between the beginning of employment and the beginning of work. In his opinion the employment in this case began at King's Cross, and the workman was in the course of his employment when the accident happened. He thought that the judgment of the learned County Court Judge was quite correct, and that the appeal ought to be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Also reported in (1900) 2 Q. B. 409; 16 T. L. R. 412.

Consult *Harrison* v. *Whitaker* (*ante*, p. 12), and cases there referred to.

## DAVIES *v.* RHYMNEY IRON COMPANY (LIMITED).

Before COLLINS, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 329.

*Arising out of and in the Course of—Going Home—On, or in, or about a Mine.*—SEC. 1, 1, *and* SEC. 7.—*The Coal Mines Regulation Act,* 1887, *sec.* 75.

A colliery company provided a train on their railway to take the workmen from the colliery to their homes. A collier on reaching the point nearest his home, three-quarters of a mile from the colliery, met with an accident.

*Held* that the accident did arise out of and in the course of the employment. *Obiter* by Collins, L.J., that the accident did not occur on, in, or about a "mine."

THIS was an appeal from the award of the Tredegar County Court Judge under the Workmen's Compensation Act, 1897. The appellant was a collier in the employment of the respondents, the Rhymney Iron Company, who were the owners of a colliery. The respondents owned a line of railway, about one and a quarter miles in length, from their colliery, and they ran a train to take the colliers from their work in the colliery to their homes. The colliers did not pay for the use of the train, and it was at their option whether or not they used it. The respondents were not bound to carry the men. The men got off the train at points nearest to their homes, the train stopping for that purpose. The appellant was going home by the train on March 6, 1899, and, when alighting from it at a point about three-quarters of a mile from the colliery, he fell and was slightly injured. The amount of the compensation, if any, was agreed at the sum of £3 13*s.* 6*d.* The case was, however, important as a test case. The County Court Judge found (1) that the accident did not arise out of and in the course of the appellant's

employment. He found as a fact that it was not a condition of the appellant's employment that he should be carried to and from his work by the train, and that the respondents provided the train as a convenience only for their workmen, and that they were not under any contract, duty, or obligation to provide it. He also found (2) that the accident did not happen to the appellant on, or in, or about the mine, the accident having happened at a distance of three-quarters of a mile from the pit's mouth. He accordingly made an award in favour of the respondents.

Mr. *Brynmor Jones*, Q.C., and Mr. *H. Morgan*, for the appellant, contended that the accident arose out of and in the course of the appellant's employment, and that the employment at the time of the accident was "about" the mine as defined by sec. 75 of the Coal Mines Regulation Act, 1887, which was incorporated in the Workmen's Compensation Act, 1897, by sec. 7, sub-sec. 2, of that Act. The railway was the property of the respondents and belonged to the mine. It was adjacent to and appurtenant to the mine, and was used in connection with their mining operations. They referred to *Holness* v. *Mackay* ([1899] 1 W. C. C. 13); *Lowth* v. *Ibbotson* ([1899] 1 W. C. C. 46); *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 1 W. C. C. 47).

Mr. *Ruegg*, Q.C., and Mr. *Anton Bertram*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, upon the findings of the County Court Judge, the accident did not arise out of and in the course of the appellant's employment. The appellant had left his place of work and had availed himself of the facilities given by the respondents to go home. He went home by a route which he was not bound to take. He was under no duty to the respondents at the time of the accident, and in no sense could the accident be said to have been connected with his employment. The County Court Judge was, therefore, right. It was not necessary to express any opinion upon the other point dealt with by the County Court Judge,

but he could see no reason to differ from him upon that point either.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

Solicitors: *Holt, Beever & Co., for Daniel Evans, Brecon, for the appellant; H. P. Beecher, for Vaizey Simons, Pontypridd, for the respondents.*

Also reported in 16 T. L. R. 329.

Consult *Harrison* v. *Whitaker* (*ante*, p. 12), and cases there referred to.

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## HERRON *v.* CHARNLEY—THE RHEA FIBRE COMPANY (LIMITED), THIRD PARTIES.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

*The Times, February* 19, 1900.

*Employer—Undertaker.*—SEC. 1, 1.

No one is liable to pay compensation under the Act except an employer who is an "undertaker."

THIS was an appeal from an award of the Judge of the County Court of Lancashire, holden at Rochdale, in an arbitration under the Workmen's Compensation Act, 1897. Herron, the applicant for compensation, was in the employment of Charnley, a joiner. Charnley undertook to do certain joinery work in a mill, belonging to the Rhea Fibre Company (Limited), which was a factory within the meaning of the Workmen's Compensation Act. The applicant, while engaged in this work, met with an accident, whereby he injured his hand. He made Charnley respondent to the arbitration, and Charnley gave notice of a claim for indemnity to the Rhea Fibre Company. The County Court Judge made an award in favour of the applicant against the Rhea Fibre Company. The company appealed.

Mr. *Rowlatt* appeared for the company; Mr. *Ernest Pollock* for Charnley; the applicant was not represented.

Mr. *Rowlatt* said that it was assumed before the County Court Judge that the only question was whether Charnley or the company was liable. The County Court Judge was clearly wrong in holding the company liable, for the applicant was not in the employment of the company. The applicant seemed to be in this difficulty—that the company was not his employer, and Charnley was not an undertaker within the meaning of the Act.

LORD JUSTICE A. L. SMITH said that the appeal must be allowed, and judgment entered for the Rhea Fibre Company, but that the judgment must not be drawn up for three weeks, and that notice must be given to the applicant of what had been done.

Also reported in *The Times*, February 19, 1900.

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## POWELL v. MAIN COLLIERY COMPANY (LIMITED).

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 282.

*Claim for Compensation.*—SEC. 2, 1.

The "claim for compensation" which is required by sec. 2, 1, to be made within six months of the occurrence of the accident, means the filing of the request for arbitration (Romer, L.J., diss.).

THIS was an appeal from the award of the Glamorganshire County Court Judge under the Workmen's Compensation Act, 1897. The respondent Powell was a workman in the employment of the appellants, the Main Colliery Company, and on December 21, 1898, he was injured by an accident arising out of and in the course of his employment. On

May 2, 1899, a notice claiming compensation was sent by the respondent to the appellants. It was admitted that this was a good claim for compensation if it was sufficient merely to send notice of a claim for compensation within six months after the date of the accident. The request for arbitration to assess compensation under the Act was filed on October 4, 1899. The County Court Judge awarded the respondent 13*s.* 11*d.* a week.

Mr. *Ruegg*, Q.C., and Mr. *A. Bertram* appeared for the appellants; Mr. *S. T. Evans* appeared for the respondent.

The only point in this case was whether "the claim for compensation," which by sec. 2, sub-sec. 1, must be made within six months from the accident, meant the filing of the request for arbitration in the County Court, or was satisfied by a notice of claim for compensation being sent by the workman to his employers.

The COURT allowed the appeal, LORD JUSTICE ROMER dissenting.

LORD JUSTICE A. L. SMITH said that the point had given rise to a great difference of opinion among County Court Judges, but in a case in the Court of Session in Scotland (*Bennett* v. *Wordie & Co.*, 1, Court Sess. Cas., Court of Justiciary, 5th Series, 855), two learned Judges expressed an opinion in favour of the view which he took, the two other Judges expressing no opinion, and the Court of Appeal in Ireland took a similar view in a case which had not yet been reported. It seemed to him that the Legislature, in fixing the time within which the claim for compensation had to be made, followed the Employers' Liability Act, 1880. The difficulty arose here because the Legislature could not adopt the same phraseology in the Workmen's Compensation Act, 1897, as in the Act of 1880, as the procedure under the later Act was not by action but by arbitration. By sec. 2, sub-sec. 1, of the Act of 1897 proceedings for the recovery of compensation under the Act were not maintainable unless "the claim for compensation" was made within six months from the occurrence of the accident. Was "the claim for

compensation" satisfied by a mere notice by the workman to the master that he claimed compensation? Or did it mean the initiation of proceedings which set in motion the procedure under which the workman recovered compensation? In his opinion it meant the latter. In sec. 1, sub-sec. 3, the word "proceedings" meant, in his opinion, the taking of what he would call judicial proceedings. So in sec. 1, sub-sec. 4, it seemed to him that the words "taking proceedings" meant the initiation of proceedings before the representative committee, or before the arbitrator agreed upon by the parties, or before the County Court Judge. He saw no difficulty in stating what amounted to taking proceedings before a representative committee or before an arbitrator. The workman would send notice to the tribunal that he claimed compensation and would ask it to adjudicate upon his claim. "The claim for compensation" would be made when he required the tribunal to assess the compensation. So in the present case, which came before the County Court Judge as arbitrator, "the claim for compensation" did not mean sending a letter making a claim. Sec. 1, sub-sec. 4, spoke of "the time limited for taking proceedings." Those words meant the initiation of proceedings before the tribunal appointed to assess the compensation. In sec. 2, sub-sec. 1, the words making "the claim for compensation" meant the bringing of the claim before the proper tribunal—the initiation of the proceedings. Upon any other view the claim might be hung up, and the master might be made liable to pay compensation after the lapse of years. He did not agree that, if notice of a claim was sent to the master, the latter could institute proceedings to have the compensation assessed, and thus prevent the claim from being hung over his head for years. The Act, and the rules and forms, were all drawn with the view of the claim being by the workman against the master. If it was intended that the master might institute proceedings one could have expected the Act to have said so in plain terms. In his opinion, therefore, the document sent to the appellants in the present case was not

"the claim for compensation" within sec. 2, sub-sec. 1, and therefore the proceedings were taken too late.

LORD JUSTICE COLLINS agreed. The policy of the Legislature was to impose a limit of six months for taking proceedings under the Act. There was one clear indication what was meant by "the claim for compensation" in sec. 2, sub-sec. 1, to be found in sec. 1, sub-sec. 4. Those words did not merely mean the notice of an intention to invoke the aid of the proper tribunal to assess the compensation, but meant the invocation of the tribunal. It must be something which let in the jurisdiction of the tribunal.

LORD JUSTICE ROMER dissented. The only section of the Act which put a precise limit of time was sec. 2, sub-sec. 1. Other sections might be referred to as throwing light upon that sub-section, but sec. 2, sub-sec. 1, must be referred to as the only enactment limiting proceedings of any kind. The words "the claim for compensation" were reasonably clear in themselves. There must be a specific claim for compensation, and it must be a claim under the Act. The section did not say "unless proceedings were taken for arbitration." He saw no reason for departing from the plain words of the Act. If a workman gave notice to his master that he claimed compensation, giving particulars so as to make it a clear claim for compensation under the Act, he (the Lord Justice) failed to see why that would not be a "claim for compensation" within sec. 2, sub-sec. 1. Before going to arbitration there must be a difference in existence. To make a difference there must be a claim made and a denial of the claim. A claim for compensation by the workman was the essence of proceedings under the Act, and it was contemplated as itself a proceeding, and a most important proceeding. In his opinion light was thrown on the words "the time limited for taking proceedings" in sec. 1, sub-sec. 4, by referring to sub-sec. 3, where the "proceedings" included something done before the arbitration began. In other words, the "proceedings" included the claim for compensation. It then became plain what was the meaning of "the time limited

for taking proceedings" in sub-sec. 4, if it was remembered that the word "proceedings" included the claim for compensation by the workman and the refusal of the claim by the master. In his opinion the County Court Judge was right.

The COURT stayed execution pending an appeal to the House of Lords.

Five other cases in the list followed the result of the above decision, and in all of them the appeals were allowed.

Also reported in (1900) 2 Q. B. 145; 69 L. J. Q. B. 542; 82 L. T. 340; 48 W. R. 834; 64 J. P. 323; 16 T. L. R. 282.

Reversed *post*.

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House of Lords.

## POWELL *v.* THE MAIN COLLIERY COMPANY (LIMITED).

Before LORD HALSBURY, L.C., LORDS MORRIS, SHAND, DAVEY, BRAMPTON, and ROBERTSON.

16 *T. L. R.* 466.

*Claim for Compensation.*—SEC. 2, 1.

The expression "claim for compensation" in sec. 2, 1, means a claim made to the employer and not the initiation of proceedings in arbitration (Lord Morris, diss.).

*Obiter*, an employer can be an applicant for arbitration.

Decision of the Court of Appeal (*ante*, p. 25) reversed.

THIS was an appeal from an order of the Court of Appeal of March 16, 1900, setting aside an award under the Workmen's Compensation Act, 1897, made by Judge Bishop, the Judge of the County Court of Glamorganshire, holden at Neath and Aberavon on October 27, 1899, whereby it was ordered that the respondent company should pay to the appellant the

weekly sum of 13*s.* 11*d.* as compensation for personal injury caused to him on December 21, 1898, by accident arising out of and in the course of his employment as a workman employed by the company in coal mining, such weekly payment to commence as from the 7th day of January, 1899, and to continue during the total or partial incapacity of the appellant, or such time as is prescribed by the Act. On May 2, 1899, the appellant duly gave to the respondents notice of the accident, as required by sec. 2 of the Act. On the same date the appellant also delivered to the respondents a document in the following terms:—

NOTICE OF CLAIM.

"*To the Main Colliery Company (Limited), Skewen.*

"Take notice that I claim the sum of 15*s.* per week, from the 4th day of January, 1899, until such date as I shall be able to resume work, as compensation for injuries received by me on the 21st day of December, 1898, at your colliery at Bryncoch.

"(*Signed*) WILLIAM POWELL.

"(*Address*) Mount Pleasant, Clydach, R.S.O."

On October 2, 1899, the appellant filed in the County Court of Glamorganshire, holden at Neath, in accordance with Rule 8 of the Workmen's Compensation Rules, 1898, a request for arbitration under the Act, embodying the same claim. The respondents by their answer, filed on October 19, 1899, pleaded that the claim for compensation, not having been made within six months from the occurrence of the accident, was barred by sect. 2, sub-sec. 1, of the Act, which is as follows:—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident

causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." It was contended on behalf of the respondents that the word "claim" must be interpreted to mean the initiation of proceedings before the arbitrator, and that in this case the only claim made within the meaning of the sub-section was the request for arbitration filed by the appellant nine months and eleven days after the accident. The appellant contended that it meant any definite demand for compensation made by an injured workman upon his employer, and was satisfied by the above "notice of claim" of May 8, 1899. The County Court Judge overruled the respondents' objection, and awarded the appellant a weekly payment of 13*s.* 11*d.* for such time as is before mentioned. On appeal Lords Justices A. L. Smith and Collins, Lord Justice Romer dissenting, adopted the respondents' interpretation of sec. 2, sub-sec 1, of the Act, and allowed the appeal. The case is reported *ante*, p. 25.

*Sir R. T. Reid*, Q.C., Mr. *S. T. Evans*, and Mr. *Redworth Davies* were for the appellant; Mr. *Ruegg*, Q.C., Mr. *C. A. Russell*, Q.C., and Mr. *Anton Bertram*, for the respondents.

The LORD CHANCELLOR, in moving that the judgment appealed from be reversed, said that the question arose within a narrow compass, but was of great importance. The whole case might be stated very shortly by reading the sub-section on which it depended. [His LORDSHIP read the section above set out.] Nothing, he continued, very much turned upon the service or the person upon whom the notice was served. Reading the actual claim which was made in this case, no one could reasonably doubt that, unless there were some circumstance extrinsic to the actual words, this was a claim for compensation, and it was not contested that it was made

within the period limited by the Act. It was made by the person injured, served by him upon the employers, and the claim was stated and described as made for a definite sum in respect of an accident referred to by its date. Without giving an artificial meaning to the words, no one could doubt that this was a claim for compensation under the Act, as it purported to be. The sole argument urged against this view before their Lordships was that a claim for compensation must be made in some form of legal procedure. That was the proposition. It might be conceded that with lawyers the ordinary form of taking proceedings would be some form of legal procedure. But the answer was that under this Act we had not the ordinary form of legal procedure. The Judges had all admitted that the word "proceedings" was used in a sense different from that which would be described as ordinary legal procedure. But it was said that the word was used in a different sense in this initial stage of the proceedings. This argument involved two assumptions. First, something must be found in the statute to justify this artificial meaning, or the Legislature must be assumed to have used the phrase "claim for compensation" with the implied addition of the words "in some form of legal procedure." He entirely repudiated the need of either assumption. There was nothing in the statute which intimated that the claim for compensation must be technical in form and application. For himself, he declined to add words which would be inappropriate to the subject-matter. A Court had no right to add words to a section in an Act of Parliament unless the exigency of the case compelled. Upon that short ground he was of opinion that the judgment of the majority of the Court of Appeal was wrong, and that of the dissenting Judge right, and that the judgment of the County Court Judge should be restored. Dealing with the statute itself, he would remark that there was a careful avoidance of technicality. It contemplated what might excite horror in the minds of lawyers, that a man injured should be able to claim so much and go to the County Court and get the matter at once decided. If

anything like a technical commencement of litigation had been intended, the Legislature might have said so; but where was there any suggestion of suit, or writ, or anything in the form of a statement of a claim? There was throughout no technical phraseology to indicate parties at issue or the initiation of proceedings. Once the claim for compensation was made, the matter was, either by agreement or by operation of the statute itself, remitted to the arbitrator. He did not agree with the argument which had been suggested, that there was no mode of procedure provided for determining the question. That there was none actually pointed to by the statute he granted. But he had never heard that a defendant could not appoint an arbitrator to have a question settled. It had happened to himself when he was at the Bar, and to others who had experience of arbitrations, that when a plaintiff had shilly-shallied about the appointment of an arbitrator the other side had taken steps to get one appointed. Why was not that procedure applicable to these cases? Lord Justice A. L. Smith had referred to such and such provisions as made for the benefit of the man, and such and such others for that of the employer. But they were not dealing with a contract, but with an Act of Parliament, and he repudiated anything tending to qualify the statute itself, which provided that the claim must be made within six months, as it had in this case been made. Lord Justice A. L. Smith had referred to two decisions, one in Scotland and the other in Ireland. When examined, however, those cases disclosed that there was really no claim made at all. The judgment of the County Court Judge should be restored and the appeal allowed.

LORD MORRIS dissented, and accepted the reasoning of Lords Justices A. L. Smith and Collins in the Court of Appeal. While the Employers' Liability Act, 1880, extended the liability of employers, that liability was confined to cases of actual or constructive negligence; but the Compensation Act made the employer an insurer against accidents. The earlier Act prescribed six months as the limit of time for

bringing an action. It would be strange if the later and wider statute did not also impose a limit. The workman might still proceed under either Act. Sec. 1, sub-sec. 4, of the Act of 1897 said, "If within the time hereinafter in this Act limited for taking proceedings." The only limitation to answer this was the expression "the claim for compensation" in sec. 2, sub-sec. 1, with its limitation of six months. That section enacted, like the Employers' Liability Act, as a condition precedent to the maintenance of proceedings, a notice to be given to the employer of the accident happening, and further enacted that "the claim for compensation" must be made within six months from the occurrence of the accident. There could not be an action, as the tribunals were only a somewhat mythical body, called a representative committee, or an agreed arbitrator or the County Court Judge as arbitrator. The latter was the choice in the present case, and the "request for arbitration with respect to the compensation payable" was lodged on October 2, 1899, much beyond the period of six months from the date of the accident. In his opinion that claim for compensation took the place of an action under the Employers' Liability Act, and there must be some proceeding initiated before the expiration of the six months, the words "claim for compensation" being substituted for the "action" in the Employers' Liability Act. The words were "the claim," not "a claim" for compensation. If the words of the Act were satisfied by the mere sending of a notice to the employer without proceeding to give seisin to any tribunal of the claim, the claim might be kept hanging over the employer's head to the most remote period of time, not even limited by the Statute of Limitations. That the employer might initiate proceedings appeared to him an unmeaning and futile contention. An examination of the elaborate provisions of sub-secs. 2, 3, 4, and 5 of sec. 2, led him to the conclusion that "the claim for compensation" could only mean an appeal to a tribunal.

LORD SHAND concurred with the Lord Chancellor, and observed that, unlike the two decisions referred to by Lord

Justice A. L. Smith, the claim in this case was specific as to amount, date of accident, and other particulars. The claim, which was the first step in the proceedings, was duly made in accordance with the Act of Parliament. It was not necessary to enter into details, and he entirely agreed with what had been said by the Lord Chancellor and by Lord Justice Romer in the Court below. The matter, according to the statute, was to be settled by an arbitrator—the matter being that which was raised by the claim. It did not say that an action was necessary. He also was of opinion with the Lord Chancellor that, after a claim in valid form had been intimated by the workman to the employer, if the workman delayed, it might be for an indefinite time, to initiate arbitration proceedings, the master would be entitled to do so to the effect of demanding that the claim should be dismissed as unfounded.

LORD DAVEY said that the reasons for his opinion had been so clearly stated by Lord Justice Romer that he took the liberty of adopting that learned Judge's language as his own.

LORD BRAMPTON, in a long judgment, after stating the facts, expressed concurrence with the Lord Chancellor's motion. There was, he said, no warrant for even a suggestion that a limit was expressly put by the statute upon the time within which arbitration proceedings must be commenced, unless it were found in sec. 2, sub-sec. 1 of the Act. He assumed that the framer of that sub-section intended in it to express, in the "ordinary language" which he had in the following sub-section enjoined an injured workman to use in preparing his notice of injury, that which every intelligent person, reading this sub-section alone for his guide, would understand from the language employed. In his opinion, only one conclusion was possible—that the workman, in giving notice of injury and making his claim for compensation within six months, had fulfilled every obligation imposed upon him by the sub-section. If it were intended to be interpreted in the sense attributed to it on behalf of the respondents, more misleading language could not have been employed.

LORD ROBERTSON also was of opinion that the appellant was right. The proceedings contemplated by the Act of 1897 for the settlement of claims were not primarily judicial proceedings; and the error of the respondents arose from overlooking this distinctive characteristic of the Act. Arbitration might be required to decide differences arising in the proceedings; but if this occurred it was only incidental to the proceedings, and was not contemplated as a necessary part of them. Once this was realized it became clear that the proper initiation of the proceedings was not an appeal to arbitration, but was exactly such a claim as that which was sent to the respondents. He would only add that the most plausible argument against the appellant—viz. that on his theory there would be no check on delay—was not supported by the statute. As soon as the claim was sent to the employer he could, if he disputed it, himself take the difference to arbitration and have it settled. The framer of the rules could not possibly take away this right which arose under the statute.

The appeal was accordingly allowed.

(1900) A. C. 366; 69 L. J. Q. B. 758; 16 T. L. R. 466.

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## WRIGHT *v.* JOHN BAGNALL & SONS (LIMITED).

Before COLLINS, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 327.

*Claim for Compensation—Time for—Waiver by Employers.*—SEC. 2, 1.

Circumstances may make it inequitable that the employer should set up the defence that a claim for compensation was not made within six months of the accident. Should this be so the arbitrator has jurisdiction to disallow the plea.

THIS was an appeal from the award of the Deputy Judge of the Walsall County Court under the Workmen's Compensation Act, 1897. The appellant, George Wright, was a waggoner

in the employment of the respondents, John Bagnall and Sons (Limited), who were iron manufacturers at West Bromwich, and on November 23, 1898, he received personal injuries by accident arising out of and in the course of his employment. He was taken to the hospital, suffering from permanent injuries. At the time of the accident his wages were 21*s.* a week. On November 26, 1898, the appellant's wife saw the respondents' ledger clerk, who told her to get a note from the hospital and bring it in three weeks' time to the works, when her husband would be "due for compensation," and that she would "pick up" half his wages. At the end of the three weeks she went with the hospital note to the works, and received 10*s.* 6*d.*, and from that time either the appellant or his wife continued to receive that sum each week until September 6, 1899, either from the respondents or from the insurance company with whom the respondents were insured. About Easter, 1899, the appellant saw the respondents' manager, when an offer of £15 was made to him as compensation, "to set him up in a little business," but the appellant refused to take it. The manager told him to go home and talk it over with his wife. A few days afterwards the appellant saw the manager again, when the appellant said that he would take £200. The manager said, "If you talk about £200 we will go to the Court with you." At Whitsuntide the manager offered the appellant £30, saying that he thought that the insurance company would give that amount. The weekly payments having stopped on September 6, 1899, the appellant filed a request for arbitration to assess the compensation payable under the Act of 1897. The respondents, in their answer, took the objection that the claim for compensation was not made within six months from the occurrence of the accident, as required by sec. 2, sub-sec. 1, of the Act. The Deputy County Court Judge held that "the claim for compensation" meant the filing of the request for arbitration, and that, therefore, the application was out of time. With regard to the question of waiver, he said that the payment by the respondents to the appellant each week up to September

6, 1899, of the exact sum to which the appellant was entitled under the Act, and the commencing of such payments at the time required by the Act, were calculated to make the appellant believe that he was receiving these payments by virtue of the Act and to lull him into a state of false security; but, on the other hand, the appellant should have known his rights under the Act, and if he thought that he had arrived at an arrangement with the respondents, he should have got them to enter into a memorandum of agreement embodying the terms of the arrangement, and registered the memorandum. He did not think that the respondents could be said to have waived any defence they might have on account of the lateness of the appellant's claim. With regard to the question of estoppel, he did not think that the respondents' conduct could dispense with the requirements of the statute. The language of sec. 2, sub-sec. 1, was peremptory, that proceedings "shall not be maintainable" unless the claim for compensation were made within six months. He accordingly held that the appellant was not entitled to compensation, and made an award in favour of the respondents. Since the hearing before the Deputy County Court Judge the Court of Appeal decided in *Powell* v. *Main Colliery Company (Limited)* that "the claim for compensation," which was required by sec. 2, sub-sec. 1, to be made within six months after the accident, meant the filing of the request for arbitration. The decision of the Deputy County Court Judge upon that point was, therefore, not sought to be disturbed.

Mr. *Disturnal*, for the appellant, contended that the respondents, by their conduct, had waived the making of the claim for compensation within the six months. There was nothing in law to prevent the respondents from waiving their right to take the objection that the claim was not made within the six months. The facts showed that it was inequitable to allow the respondents to set up the objection. The limitation of time in sec. 2, sub-sec. 1, of the Act affected the remedy, like the Statute of Limitations, and did not bar the right. Further, the respondents were estopped by their

conduct from denying that proceedings to assess compensation had been commenced within the six months.

Mr. *W. F. Craies*, for the respondents, contended that there could be no estoppel preventing them from setting up the limitation of time. The respondents might waive the objection by not setting it up in their answer, or they might have agreed not to take the objection. The facts here did not show any waiver.

The COURT allowed the appeal and remitted the case to the Deputy County Court Judge.

LORD JUSTICE COLLINS said that the Deputy County Court Judge held, as he (the Lord Justice) read his holding, that it was not for him to consider whether the circumstances of the case debarred the respondents from raising the objection of the lapse of time. It seemed to his Lordship that in the circumstances of this case the Deputy Judge was wrong in holding that as a matter of law the respondents were not debarred from setting up that objection. In his opinion, there was evidence before the Deputy Judge that the parties had agreed absolutely that there was a liability under the Act on the part of the respondents to pay compensation, that the amount alone was not agreed upon, and that the appellant had the right to go to arbitration for the purpose of having the amount settled. The weekly payments had been made for a considerable time. Then the question arose as to commuting the weekly payments for a lump sum. Differences arose as to the amount, and the respondents' manager said that if the appellant stood out for so large a sum as £200 they would go to the Court. That was a clear recognition of the jurisdiction of the Court. Upon that the appellant forbore from taking proceedings to have the amount of the compensation assessed, but negotiated upon the question, and while the negotiations were going on the six months' limit of time expired. In that state of things there was ample evidence of an agreement that compensation was to be paid, the only question left open being the amount thereof. If that were made out the respondents were not in a position to

take the objection that the six months had expired. In his opinion the respondents had also debarred themselves, by treating the question as still open to negotiations and leading the appellant to act on that view, from taking the objection. In his opinion there was ample evidence upon which the Deputy Judge might find that the respondents were not entitled to raise the defence, and there was nothing in point of law to prevent the Judge from so finding. The case must, therefore, be remitted to the Deputy County Court Judge. The appeal would be allowed, with costs here and below.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

Mr. *Craies* said that instead of the case being sent back to the Deputy County Court Judge his clients would agree to pay the appellant 10*s.* 6*d.* a week.

Solicitors: *James Mitchell, for Willcock & Taylor, Wolverhampton, for the appellant; Morgan, Price, and Mewburn, for Hargreave & Heaton, Birmingham, for the respondents.*

Also reported in (1900) 2 Q. B. 240; 69 L. J. Q. B. 551; 82 L. T. 346; 48 W. R. 533; 64 J. P. 420; 16 T. L. R. 327.

Consult *Powell* v. *Main Colliery Company* (*ante*, p. 29); and *Rendall* v. *Hill's Dry Dock Company* (*post*).

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## RENDALL *v.* HILL'S DRY DOCK COMPANY.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 368.

*Admission of Liability—Waiver of a claim for Compensation.—*

SEC. 2, 1.

An employer paid for 10 months one-half the average weekly earnings of an injured workman, and took receipts which stated that the money was received "on account of compensation which may be or become due

to me under the Workmen's Compensation Act, 1897." No claim for compensation had been made.

*Held* that there was no evidence of an admission of liability and that the employer was not estopped from taking the objection that no claim had been made.

THIS was an appeal from an award of the Judge of the Cardiff County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was a shipwright who sustained accidental injuries in the course of his employment on December 19, 1898. The applicant did not make any claim on his employers or send in any request for proceedings under the Workmen's Compensation Act until more than six months after the date of the accident. During that period weekly payments of £1 were made to him by an insurance company with whom his employers had insured their liability under the Act, and he gave receipts, which were expressed to be on account of compensation which might be or become due to him under the Workmen's Compensation Act. When this case was before the County Court Judge the case of *Powell* v. *Main Colliery Company* (*ante*, pp. 25, 29) had not been decided. In that case the Court of Appeal held that, on the construction of sec. 2 of the Act, proceedings under the Act were not maintainable unless a request for proceedings was filed within six months of the accident. The County Court Judge made an award in favour of the applicant for a weekly payment of 18*s*. The employers appealed.

Mr. *Montague Lush* (Mr. *Albert Parsons* with him), for the employers, contended, on the authority of *Powell* v. *Main Colliery Company*, that the proceedings were not maintainable.

Mr. *Bailhache*, for the applicant, argued that the weekly payments, coupled with the taking of the receipts from the applicant, estopped the employers from setting up the defence that the applicant had not made a claim for compensation within six months. He relied on the case of *Wright* v. *John Bagnall & Sons* (*ante*, p. 36).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in this case the applicant had not, so far as appeared by the evidence, given any notice of accident as required by sec. 2, sub-sec. 1, of the Act, and he certainly had not made any claim for compensation by filing a request for arbitration within six months of the accident. The employers were insured, and sent in to the insurance company particulars of the accident, in which they stated that the workman's wages were £2 a week. The insurance company did what good masters would have done, that was to say, they made him payments of £1 a week on account, and they took receipts. The Court could not hold that that amounted to a waiver or estoppel so as to preclude the employers from now raising the defence that the applicant had not made a request for proceedings within six months. This case was quite different from that of *Wright* v. *Bagnall.* In that case there was an absolute agreement between the parties as to liability of the respondents to pay compensation under the Act, and the only matter which remained in question was the amount. In the present case there was no evidence of such a state of things as that. The appeal must therefore be allowed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Also reported in (1900) 2 Q. B. 245; 69 L. J. Q. B. 554; 82 L. T. 521; 48 W. R. 530; 64 J. P. 451; 16 T. L. R. 368.

Consult *Powell* v. *Main Colliery Company* (*ante*, p. 29); and *Wright* v. *Bagnall* (*ante*, p. 36).

## HADDOCK v. FISHER & SONS.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

*The Times, May* 7, 1900.

*Service out of Jurisdiction.*—SEC. 2, 4.—RULE, 15, 2.

Can a request for arbitration be served without leave out of the jurisdiction?

THIS was an appeal from a decision of the Judge of the Chepstow County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant was a workman who had met with an accident in the course of his employment. The accident happened within the local jurisdiction of the Chepstow County Court, and the applicant resided within that jurisdiction. The employers resided at Newry, in Ireland. The applicant having made a request for proceedings under the Act to be taken before the Judge of the Chepstow County Court, the employers duly appeared and filed an answer, in which they did not take any objection to the jurisdiction of the Court, but on the hearing of the arbitration they objected that, as they were resident in Ireland and no leave had been obtained to serve them out of the jurisdiction, the County Court Judge had no jurisdiction, to entertain the case. The County Court Judge acceded to this view and declined to make an award. The applicant appealed.

Mr. *Neilson* appeared for the applicant, and contended that the County Court Judge had jurisdiction and ought to have determined the case. By para. 9 of Sched. II., where any matter under the Act was to be done in a County Court the same should be done in the County Court of the district in which all the parties concerned resided, or if they resided in

different districts the district in which the accident occurred. Here the accident occurred within the Chepstow district, and that was sufficient to give jurisdiction. Secondly, the employers by appearing and filing an answer had waived any objection they might originally have had to the jurisdiction. On this point he referred to *Jones* v. *James* (19 L. J. Q. B., 257).

Mr. *Kilburn*, for the respondents, argued that the County Court Judge was right in declining jurisdiction. Para. 9 of Sched. II. did not give jurisdiction where either of the parties resided out of England. And this want of jurisdiction could not be cured by any waiver. He referred to *Farquharson* v. *Morgan* ([1894], 1 Q. B., 552), *Fry* v. *Moore* (23 Q. B. D. 395), and *The City of Agra* ([1898] P. 198).

In the result it was ordered by consent that the case should be tried in the Chepstow County Court.

This case is reported because it raises an important question and is referred to and commented on in the 2nd Edition of "The Case Law of the Workmen's Compensation Act" (1900). See sec. 2, sub-sec. 4, and Rule 15, para. 2.

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## COOPER *v.* DAVENPORT—WINSTANLEY, THIRD PARTY.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 266.

*Sub-contractors—Indemnity.*—SEC. 4.

A sub-contractor for part of a building is not an "undertaker," and is not liable to indemnify under sec. 4.

THIS was an appeal from the award of the Warrington County Court Judge under the Workmen's Compensation Act, 1897. The applicant for compensation was the

widow of a deceased workman who had been in the employment of the appellant, William Winstanley. The respondent, Charles William Davenport, was a builder, and he had entered into a contract with the Warrington guardians to build a workhouse infirmary. Davenport sublet the plumbing work of the building to Winstanley. The deceased man Cooper was employed by Winstanley, and on September 28, 1899, he was at work on a scaffolding on some of the plumbing work—namely, fixing the piping to the exterior of the building—when the scaffolding gave way, and he fell and was killed. The building exceeded 30ft. in height, and was being constructed by means of a scaffolding. The deceased man's widow claimed compensation under the Act against Davenport, and Davenport thereupon claimed to be indemnified by Winstanley, under sec. 4 of the Workmen's Compensation Act, 1897. The County Court Judge made an award in favour of the widow for £260 as against Davenport, and ordered Winstanley to indemnify Davenport in respect of that amount. Winstanley appealed.

Mr. *Ruegg*, Q.C. (Mr. *Hartley* with him), for the appellant, contended that as the Court had already decided that a sub-contractor was not an "undertaker" within the Act, and was therefore not liable to pay compensation—*Cass* v. *Butler* (*post*, p. 87)—the appellant was not liable to pay compensation, and, that being so, he was not liable under sec. 4 to indemnify the contractor Davenport, who was the undertaker, and therefore liable. Sec. 4 only provided that the undertakers should be entitled to be indemnified by any other person who would have been liable independently of that section. That did not apply to a sub-contractor, who was not made liable by the Act at all. The undertakers could only claim indemnity from a person who was himself liable to pay compensation under the Act.

Mr. *C. A. Russell*, Q.C. (Mr. *E. Acton* with him), for the respondent, Davenport, contended that the decision in *Cass* v. *Butler* did not touch the present case, though some of the reasons given by the Court were not favourable to the

respondent's contention. In order to see who was liable to indemnify, sec. 4 must be considered as cut out of the Act. That section said, "who would have been liable independently of this section." Independently of sec. 4, a sub-contractor was an "undertaker," and would be liable as such. Therefore a sub-contractor was bound to indemnify under sec. 4. [LORD JUSTICE ROMER: That argument is dead in the teeth of *Cass* v. *Butler*. It was the argument addressed to us in that case, which we rejected.] The decision in that case did not touch the present point. If sec. 4 were out of the Act, a sub-contractor would be an undertaker within the meaning of secs. 1 and 7.

LORD JUSTICE A. L. SMITH said that the point which had been taken by the respondent was not open. It had been decided in *Cass* v. *Butler* that a sub-contractor was not an undertaker within the Act. He saw no ground for quarrelling with the reasons which were given for that decision. A person could only be liable to pay compensation under the Act if he was an undertaker. A sub-contractor was not an undertaker, and was therefore not liable to pay compensation under the Act. He was not therefore liable to indemnify another person liable under sec. 4.

LORD JUSTICE COLLINS concurred. The meaning of the word undertaker was given in sec. 7 of the Act. Any reference in sec. 4 to that point would merely be corroboration of the meaning of the word in the Act. Sec. 4 might be of assistance in helping the Court to construe the word, but the meaning was given in the definition clause.

LORD JUSTICE ROMER agreed.

Solicitors: *Busk, Mellor, & Morris, for Slater, Heelis, Williamson, Colley, & Tulloch, Manchester, for the appellant; F. M. Richards, for A. J. Willett, Warrington, for the respondent.*

Also reported in 16 T. L. R. 266.

# PEARCE *v.* LONDON AND SOUTH WESTERN RAILWAY.

Before COLLINS, VAUGHAN WILLIAMS, AND ROMER, L.JJ.

16 *T. L. R.* 336.

*Ancillary or Incidental Work—Railway Company—Rebuilding Station.* —SEC. 4.

Rebuilding stations is work "merely ancillary or incidental to and is no part of or process in the trade or business carried on by" a railway company.

THIS was an appeal from the award of the Southwark County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was a painter in the employment of Messrs. Perry and Co., who were builders and contractors. Messrs. Perry and Co. had entered into a contract with the respondents, the London and South Western Railway Company, to do such work in the way of altering, repairing, and painting the respondents' stations in the London district as they might be directed to do by the district engineer at a fixed schedule of prices. Messrs. Perry and Co. were engaged under this contract in reconstructing Hampton Court Station, and the appellant was employed by them on the work. While so employed the appellant was injured by an engine belonging to the respondents. The appellant contended that the respondents, though not his employers, were liable under sec. 4 of the Workmen's Compensation Act, 1897, to pay compensation. The County Court Judge held that the respondents were not liable to pay compensation, because the operation of sec. 4 was excluded by the clause at the end, the building of a station being "no part of or process in the trade or business carried on by" the railway company, but being "merely

ancillary or incidental" thereto. He therefore made an award in favour of the respondents. The County Court Judge also found that the accident arose "in the course of" the appellant's employment, but did not arise "out of" his employment. Upon that ground also he decided in favour of the respondents, but as it became unnecessary to argue this point in the Court of Appeal, and as they expressed no opinion upon it, the facts relating to it are omitted from this report. By sec. 4 of the Workmen's Compensation Act, 1897:—"Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively."

Mr. *J. D. Crawford*, for the appellant, contended that sec. 4 of the Act applied to this case. The "undertakers," in the case of a railway, were defined by sec. 7, sub-sec. 2, to mean the railway company. The railway company had entered into a contract with a contractor to do certain work at their station, and sec. 4 made them liable to pay compensation for an accident to a workman employed by the contractor in the

execution of the work, if they would have been liable to pay compensation had such work been executed by their own workmen. The last clause of the section, however, provided that the section was not to apply to any contract with any person for the execution by or under such contractor of any work which was merely ancillary or incidental to, and was no part of or process in, the trade or business carried on by the undertakers. The reconstruction of the station was part of the business of the railway company, and was not merely ancillary or incidental thereto. The business of a railway company was to carry passengers and goods and to provide reasonable accommodation for that purpose. A station was a reasonable accommodation to provide. The County Court Judge was, therefore, wrong.

Mr. *J. Lawson Walton*, Q.C., and Mr. *R. B. D. Acland*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, the learned County Court Judge was right. The appellant was in the employment of a contractor who was, under a contract with the railway company, engaged in rebuilding Hampton Court Station. He would assume that the accident to the appellant arose out of and in the course of his employment. Inasmuch as he was not employed by the railway company he could only make them liable under sec. 4 of the Act. That section was clearly an enabling section. It conferred a special boon in certain cases. If the section had stopped before the proviso, a liability would, in his opinion, have been imposed upon the railway company under the section. It was not unnatural, however, to find that the boon thus conferred was clogged with a condition. The last clause in the section contained the condition. The section was not to apply to a contract with any person for the execution by or under such contractor of any work which was merely ancillary or incidental to, and was no part of or process in, the trade or business carried on by the railway company. In his opinion, it would be difficult to find a better illustration

than the present of work which was merely ancillary or incidental to the business of a railway company as distinguished from work which was part of the actual business of the company. It was easy in certain cases to imagine a contract for work which was part of the business or trade of certain undertakers. But it was difficult to imagine such a contract in the case of a railway company. It was difficult to imagine a railway company entering into a contract with a contractor to work their engine upon their line for them. The business of a railway company was to carry passengers and goods. That was their primary duty. The erection of a station was no part of or process in the trade or business carried on by a railway company. There was no obligation upon a railway company, apart from any special obligation assumed by them under their Acts, to place a station at any intermediate spot on their line. Their trade and business was to carry passengers and goods from one place to another. The construction of the station was not part of the main work of the company, but was merely ancillary or incidental to it. It was, therefore, "no part of or process in the trade or business carried on by" the company. The County Court Judge was, therefore, right.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Also reported in (1900) 2 Q. B. 100; 69 L. J. Q. B. 683; 82 L. T 487; 48 W. R. 599; 16 T. L. R. 336.

Consult "Accidents to Workmen."

The arbitration in the County Court is reported at p. 152.

## MILNER *v.* GREAT NORTHERN RAILWAY COMPANY.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 249.

*On, or in, or about.*—SEC. 7, 1.

Employment in a refreshment-room at a railway station is not employment "on, or in, or about a railway."

THIS was an appeal by the employers from an award of the Judge of the County Court of Northamptonshire, holden at Peterborough, in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was Eliza Milner, who was in the employment of the Great Northern Railway Company as an assistant barmaid in the refreshment-room at Peterborough Station. On April 5, 1899, while she was dusting a counter in this room in the course of her duty, a framed advertisement fell from the wall, and struck her on the head, and caused her injury. The County Court Judge made an award in her favour for £8 with leave to her to apply for further relief. The question raised in the appeal was whether the employment in which the applicant was engaged was an employment to which the Act applied. By sec. 7, sub-sec. 1, of the Act, the Act is to apply to employment on or in or about a railway. And, by sub-sec. 2, "railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and "railway" and "railway company" have the same meaning as in the Act of 1873. By sec. 3 of the Act of 1873 "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic. The refreshment-room in question was a large room in the railway company's station building. It opened from the up arrival platform and was accessible to the public from that platform only. It was contended on

the part of the employers in support of the appeal that the applicant was not employed in the business of the company in its capacity as a railway company. The company carried on business as a railway company, and it also carried on the business of purveyors of food and hotel-keepers. Those two businesses ought to be treated as quite distinct, and the Workmen's Compensation Act only applied to that business of the company which was concerned with traffic. On the part of the applicant it was argued that the case came exactly within the words of the Act. She was employed in this refreshment-room, which was part of the station, and the word "railway" included station, and therefore she was employed on a railway. It was not necessary that each particular part of a station should be shown to be used for the purposes of traffic before it could be brought within the Act.

Mr. *Montague Lush* and Mr. *A. Clutton-Brock* appeared for the railway company; Mr. *T. H. Walker* for the applicant.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion a refreshment-room did not come within the meaning of a railway in the Workmen's Compensation Act, coupled with the Regulation of Railways Act, 1873. By sec. 3 of the last-mentioned Act "railway" included every station used for the purposes of public traffic. The question was whether this refreshment-room was used for the purposes of public traffic, for in his opinion the section did not mean every part of the station, but that part of the station which was used for purposes of public traffic. He thought that a bookstall could not be said to be so used, neither could an hotel. The learned County Court Judge had held that a refreshment-room was used for the purposes of public traffic. There seemed, however, to be good authority for saying that this was not correct. In the case of *South-Eastern Railway Company* v. *Railway Commissioners* (6 Q. B. D. 586) the question was whether the Railway Commissioners had jurisdiction over refreshment-rooms. The Commissioners had

assumed such jurisdiction, but the Court of Appeal held that they had been wrong in doing so, on the ground that refreshment-rooms did not come within the meaning of "facilities for the receiving, forwarding, or delivering traffic upon the railway," however desirable they might be for the comfort or convenience of passengers. That showed clearly in which way the point now before the Court ought to be decided. A refreshment-room at a railway station was not used for the purposes of public traffic, but was only for the convenience of passengers. The appeal must therefore be allowed.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER delivered judgment to the same effect.

Solicitors: *Bescoby & Williamson, Retford, for the applicant; R. Hill Dawe, for the railway company.*

Also reported in (1900) 1 Q. B. 795; 69 L. J. Q. B. 427; 82 L. T. 187; 48 W. R. 387; 64 J. P. 291; 16 T. L. R. 249.

Consult (1899) 1 W. C. C. 44 *et seq.*; also *post*; and *Davies* v. *Rhymney Iron Company* (*ante*, p. 22).

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## LAWSON *v.* ATLANTIC TRANSPORT COMPANY (LIMITED).

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 181.

*On, or in, or about—Dock—Machinery or Plant—Ship in Dock.—* SEC. 7, 1 *and* 2.—*Factory and Workshop Act*, 1895, *sec.* 23.

A man was employed in the hold of a ship in dock making up sets which were then hauled up by an hydraulic crane. The runner of the crane at the time of the accident was not on board the ship, but on the quay or wharf.

*Held* that the employment was on, in, or about a "factory."

THIS was an appeal from the award of the Bow County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent was

the widow of a workman, who at the time of his death was in the employment of the appellants, the Atlantic Transport Company. The respondent claimed compensation under the Act on behalf of herself and children. The following facts were admitted:—The deceased man was on May 8, 1899, at work for the appellants as a stevedore, with others, in the hold of the appellants' steamship *Mackinaw*, which was being discharged in the West India Docks. The *Mackinaw* was lying in the dock moored to the quay, and the cargo, which was in bags, was being discharged from the hold of the ship on the quay by the Dock Company's hydraulic crane situate on the quay. The crane was worked by the appellants' men. There were eight men in the gang at work in the hold, of which the deceased was one, two men in each corner of the hold, and each two men made up sets consisting of fifteen bags each, which they laid across a rope strop, and then fastened the strop on to the hook of the runner of the hydraulic crane, which then heaved up the set out of the hold and landed it on the quay. Between four and five o'clock in the afternoon of May 8, 1899, the deceased and another man were making up a set in the hold, and had got twelve bags across the rope strop, and were in the act of putting another bag on to the twelve bags, when some bags from the tier behind them fell on to them. The runner of the crane, at the time the tier fell, was not attached to the strop of the set which the deceased man was making up, but was ashore at the time. The deceased man died from the injuries so received. The County Court Judge held that the case was not distinguishable from *Woodham* v. *Atlantic Transport Company* ([1899] 1 W. C. C. 52), and that therefore, by sec. 23, sub-sec. 1, of the Factory and Workshop Acts, 1895, and sec. 7 of the Workmen's Compensation Act, 1897, the employment was on, in, or about machinery used in the process of unloading from a quay, and was therefore on, in, or about a "factory" to which the Act applied. He accordingly made an award in favour of the respondent. The appellants contended that the decision in *Woodham* v. *Atlantic Transport Company* did

not apply, because in that case the accident happened while the end of the chain of the crane was on board the ship and while the cases were being placed by the deceased man in the basket attached to the chain of the crane; whereas in the present case the deceased man was not, at the time of the accident, employed on, in, or about the crane, as the chain of the crane was then on shore.

Mr. *D. C. Leck* appeared for the appellants.

Mr. *W. M. Thompson,* for the respondent, was not called upon.

The COURT dismissed the appeal, saying that they could not distinguish the case from *Woodham* v. *Atlantic Transport Company,* and that therefore the County Court Judge was right.

Solicitors: *Holman, Birdwood, & Co., for the appellants; Griffith & Gardiner for the respondent.*

Also reported 82 L. T. 77; 16 T. L. R. 181.

Consult *Milner* v. *Great Northern Railway* (*ante*, p. 51); and the cases there referred to.

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## FENN *v.* MILLER.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 265.

*On, or in, or about.*—SEC. 7, 1.

Carting water to and for the purposes of, but, at the time of the accident, 110 to 160 yards away from a mortar mill is not employment "about" the mill.

THIS was an appeal from the award of Judge French, Q.C., sitting at Bow County Court, under the Workmen's Compensation Act, 1897. The appellant, the employer, was a builder, and was building houses upon a building estate

which was being developed at Chingford, in Essex. At the time of the accident the houses were between 5ft. and 6ft. in height. There were two steam engines in sheds on different parts of the building estate used for working two mortar mills for the purpose of making mortar for the buildings. The respondent on the appeal, who claimed compensation under the Act, was a builder's labourer in the employment of the appellant, and his duty was to drive or conduct a water-cart and horse along a public road to Ching Brook to fetch water for the engines and the mortar mills. On March 13, 1899, the respondent had gone with the cart to the brook, and on his way back to the mortar mill the horse ran away and knocked the respondent down and the cart went over him. For the injuries thus caused he claimed compensation. The spot where the accident happened was about 110 yards to 160 yards distant from the nearest engine. The County Court Judge held that the respondent was at the time of the accident employed "about" the engine shed, and therefore about a factory within sec. 7 of the Workmen's Compensation Act, 1897, and he made an award in his favour for 15*s.* a week.

Mr. *Rawlinson*, Q.C. (Mr. *P. Rose-Innes* with him), for the appellant, contended that the question was whether the respondent was employed "on, or in, or about a factory," within the meaning of sec. 7 of the Workmen's Compensation Act, 1897. The steam engines working the mortar mills were "factories" within the Act, as decided in *McNicholas* v. *Dawson* ([1899] 1 W. C. C. 80). But the respondent was not employed "about" the factory within the meaning of the Act. "About" meant in close propinquity or in physical contiguity to the factory—*Powell* v. *Brown* ([1899] 1 W. C. C. 44); *Lowth* v. *Ibbotson* ([1899] 1 W. C. C. 46). There was no evidence that the respondent was employed about the factory when the accident happened. A man might be employed about the business of the factory, and yet not employed about the factory. The County Court Judge was therefore wrong. He also referred to *Holness* v. *Mackay* ([1899] 1 W. C. C. 13).

Mr. *Ruegg*, Q.C., and Mr. *W. M. Thompson*, for the respondent, contended that, this being a building estate with buildings being erected on it, and there being on the estate a steam-engine, which was a factory within the Act, and which was used in connexion with the building of the houses, the estate might be considered as in the position of a factory yard. It was a question of fact in each case for the County Court Judge whether the workman was at the time of the accident employed "about" a factory. It was not a question of law. Where could the Court draw the line? Would 100 yards away from the factory, or 50 yards, or ten yards, be the limit? The Court had never yet in such a case interfered with the finding of the County Court Judge. *Chambers* v. *Whitehaven Commissioners* ([1899] 1 W. C. C. 47) was referred to.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, the facts in the present case showed that the finding of the County Court Judge was wrong. But he felt a difficulty in the case which he would state presently. There were two mortar mills worked by steam-engines, and the respondent was employed to take a water-cart to a brook in order to fill it with water, and to then return with it to the mills. While returning from the brook to the mill along a public road the horse ran away and knocked the respondent down and injured him. The place where the accident happened was from 110 yards to 160 yards distant from the nearest engine. It was quite clear from the decision in *McNicholas* v. *Dawson* that the engine was a "factory" within the meaning of sec. 7 of the Workmen's Compensation Act, 1897. Therefore the question was whether the respondent was employed "on, or in, or about a factory" within the meaning of sec. 7. If he (the Lord Justice) had been the judge of fact in the case he would not have found that the employment was "about" the factory. The County Court Judge considered that the word "about" was an elastic word, and that he was entitled to say that 110 yards away from the factory was "about" the factory, that was, in close

propinquity thereto, as he (the Lord Justice) had expressed its meaning in *Powell* v. *Brown*, or in physical contiguity thereto, as LORD JUSTICE COLLINS had expressed it in the same case. The difficulty he (the Lord Justice) had was in saying that there was no evidence upon which the County Court Judge could so find. In *Powell* v. *Brown* a cart belonging to the owners of a factory was standing in a street close to the entrance of the factory yard where timber was usually loaded from the factory on to carts. The workman was employed in loading the cart, and in doing so was injured. The question was whether he was employed "about" the factory. This Court undoubtedly held that the word "about," following the words "on or in," was an enlarging word, intended to cover more than was included in the preceding words. He (the Lord Justice) said it meant in close propinquity; Lord Justice Collins used the words physically contiguous. In *Chambers* v. *Whitehaven Commissioners* the Court held that the word "about" indicated locality, and he had said that the locality of the accident must be within the purview of the section, and that the employment must be on, in, or about the named locality at the time of the accident. In *Lowth* v. *Ibbotson* a workman met with an accident a mile and a half away from the factory, and the County Court Judge held that he was not at the time of the accident employed "about" the factory. This Court held that the Judge was right. In those cases he had said, and he thought that the other Judges also said, that the question whether the employment was about a factory was a question of fact for the County Court Judge to decide. He saw no reason to withdraw from what he had then said. In the present case the workman was conducting a cart along a public highway when he was injured, the accident happening not less than 110 yards from the factory. If he (the Lord Justice) had to determine whether the workman at the time of the accident was employed about the factory he would say no. But the difficulty he felt was in saying that there was no evidence upon which the County Court Judge could say

that the employment was about the factory. However, though he felt great difficulty in saying that there was no evidence, inasmuch as his brethren were of opinion that there was no evidence to justify the finding of the County Court Judge, he would not differ from the conclusion at which they had arrived.

LORD JUSTICE COLLINS said that he agreed that in each case it was a question of fact for the County Court Judge, and that this Court could not interfere with the finding of the Judge on a question of fact where there was evidence to support his finding. But a County Court Judge could not under the Workmen's Compensation Act, 1897, any more than any other Act, exercise that jurisdiction without any evidence to support his finding or without a proper direction to himself. If the case were one that could be tried with a jury the County Court Judge would have to give the jury a direction as to what constituted employment "about" a factory. He could not simply tell them that it was a question of fact for them whether the employment was about a factory when the accident happened and then leave it to them without any further direction to say whether in fact the employment was about a factory. He would have to give them some direction upon the word "about." Under the Act of 1897 the Judge must direct himself. It was not easy to define what constituted employment "about" a factory. Still he thought that a Judge could give some assistance to a jury by giving illustrations of cases which would or would not be employment about a factory, or by giving extreme cases which would obviously fall on one side or the other of a line which had to be drawn. Here it was quite possible to point out extreme limits on the one side and on the other, limits which were to be observed and avoided. In his opinion the word "about" was a geographical expression, and denoted physical contiguity. It was not enough to establish that the workman was about the business of his master. There was that broad distinction. A factory presumably involved the carrying on of some business. Take

the case of a factory where some article of commerce was produced. The article had to be manufactured and distributed over the country. In all probability coals would be required for the factory, and he should say that the carter who fetched the coals for the factory would be employed about the business of, but not in physical contiguity to, the factory. The jury would have to disabuse their minds of the idea that, because a man was employed about the business, he was therefore employed about the factory. What, then, was employment "about" a factory? A case obviously within the line was where a factory involved the use of an area of land outside the physical factory itself. In such a case he would say that the piece of land was about the factory. It was easy to give illustrations. In *Powell* v. *Brown* the cart upon which the man was working was outside the physical limits of the factory, but was receiving timber from the factory at the usual and accustomed place of loading. There the Court held that the employment was about the factory. It was easy to put cases which fell inside and outside the line, and it would be for the jury, if that were the proper tribunal, to say whether the particular case before them fell inside or outside the line. He drew a clear distinction between employment about the business, involving no physical contiguity with the factory, and such a physical contiguity with the factory as a jury might say was necessary for the purposes of the business. Applying the above considerations to the present case, he did not think that the facts brought the case within the rule above mentioned as to physical contiguity. It might, therefore, well be said that there was no evidence upon which a jury could reasonably find that the employment here at the time of the accident was "about" the factory. That being so, there was no evidence upon which the County Court Judge could so find. His decision must, therefore, be reversed.

Lord Justice Romer was of the same opinion. It was clear that when the Act spoke of "on, or in, or about" a factory it was speaking of a place. It was not necessary or

advisable to attempt to lay down general rules and propositions as to when a man could or could not be properly said to be on, or in, or about a factory or a building. He would not attempt to do so. He would, however, go as far as this. A man who, at the time when the accident occurred, was only employed in driving or conducting a cart containing materials necessary for the business of the factory to or from the factory, and was not in obvious proximity to the factory, was not employed on, or in, or about the factory. The facts in the present case clearly showed that at the time of the accident the workman was in no true sense employed on, or in, or about his master's factory. He agreed with Lord Justice Collins that there was no evidence that the workman was so employed. If this case had been tried with a jury, assuming, of course, such a mode of trial were possible, he thought that the Judge should have ruled that there was no evidence to go to them that the workman was so employed.

Solicitors: *Ponsford & Devenish, for the appellant; Buchanan & Hurd, for the respondent.*

Also reported in (1900) 1 Q. B. 788; 69 L. J. Q. B. 439; 82 L. T. 284; 48 W. R. 369; 64 J. P. 356; 16 T. L. R. 265.

Consult *Milner* v. *Great Northern Railway* (*ante*, p. 51); and the cases there referred to.

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## FRANCIS v. TURNER.

Before A. L. SMITH, COLLINS, and WILLIAMS, L.JJ.

16 *T. L. R.* 105.

*Factory—Belonging to another.*—SEC. 7.

Employment on a "factory" means employment on the factory which belongs to the employer, and on which he carries on his business. It does not include employment at a factory belonging to another person.

THIS was an appeal from the decision of the Newtown County Court Judge in proceedings to assess compensation

under the Workmen's Compensation Act, 1897. The appellant was a labourer in the employment of the respondents, who were the owners and occupiers of a factory. On November 14, 1898, the appellant was sent by the respondents with three other workmen to the cloth factory of the Severn Tweed Company to remove from the engine-shed an old disused steam-engine which the respondents had purchased. According to the evidence the men had to remove two cog-wheels and the shafting, and then the frame. There was a prop on the frame which ran up to some iron girders upon which two tanks rested. The prop had to be removed, and inquiry was made whether the prop supported anything, and the men were told that it could be knocked down. When the prop was knocked down the tanks came down and fell upon the respondents' men, killing two of them and seriously injuring the appellant. It appeared from the evidence that Mr. Turner, one of the respondents, came to the Severn Tweed Company's mills once or twice during the work. The Severn Company's machinery was driven by steam or gas, and their carding machine was working close to the respondents' workmen. In the back part of the engine-shed an engine was going and pumping water for steam power for the mills. It was admitted that the accident arose out of and in the course of the appellant's employment. The Severn Company's factory was 860 yards from the respondents' factory by the footpath, and rather further off by the road. The County Court Judge held that the employment of the appellant was not an employment on, in, or about a factory within the meaning of sec. 7, sub-sec. 1 of the Workmen's Compensation Act, 1897, and he accordingly dismissed the application to assess compensation.

Mr. *Ellis Griffith* and Mr. *H. C. Davenport*, for the appellant, contended that the Act applied to an accident happening to the appellant in the Severn Company's factory. It was not necessary that the accident should happen at his employers' factory, if the workman was sent on his employers' business to work at another factory. Sec. 7,

sub-sec. 1, of the Act of 1897 spoke of employment by the undertakers "on, or in, or about a factory," not "the" factory. Secondly, the respondents were the occupiers for the time being of the engine-shed at the Severn Company's mills, and were, therefore, the occupiers of a factory within the meaning of sec. 23 of the Factory and Workshop Act, 1895. The word "undertakers" was defined by sec. 7, sub-sec. 2, of the Act of 1897 as meaning the occupier of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. Sec. 93 of the Factory and Workshop Act, 1878, was also referred to.

Mr. *Ruegg*, Q.C., and Mr. *A. Powell*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that there could be no doubt about the case. The respondents were the occupiers of a factory, and if the accident to the appellant had happened there the Act would have applied. The respondents had bought an engine which was in a factory about half a mile away from their own factory, and their workmen were sent to remove the engine to their factory. The first question was whether the employment in which the accident happened was an employment by the undertakers "on, or in, or about a factory," within sec. 7, sub-sec. 1, of the Act. In his Lordship's opinion those words meant employment at the factory which was occupied by the employers and where the employers carried on their business. The words did not include employment at another factory. It was then said that the respondents were the occupiers of a factory within the Severn Company's mills within the meaning of the Act. They were clearly not the occupiers of the factory in the ordinary sense. But the word "undertakers" was defined as meaning the occupiers of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. There was only one possible section in those Acts which could be relied upon—namely, sec. 23 of the Factory and Workshop Act, 1895. That section only said, so far as material to the

present case, that certain provisions of the Factory Acts, relating to the fencing of machinery, etc., should have effect as if all machinery and plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, and any premises on which machinery worked by steam, water, or other mechanical power was temporarily used for the purpose of the construction of a building or any structural work in connexion with a building, were included in the word factory, and the person so using the machinery should be deemed to be the occupier of a factory. That provision did not apply to the present case. It was a special legislative provision as to such machinery and such premises. The appeal must be dismissed.

LORD JUSTICE COLLINS and LORD JUSTICE VAUGHAN WILLIAMS concurred.

Mr. *F. H. Mellor*, who appeared for the Severn Tweed Company, said that a third party notice had been served on them by the respondents under sec. 6 of the Act of 1897, and he asked that their costs of the appeal should be paid by the respondents. They were bound to appear in the County Court to defend their rights.

Mr. *Ruegg* said that no notice to appear on the appeal had been served on the Severn Tweed Company, and

The COURT thereupon said that the Severn Company were not entitled to their costs.

Solicitors: *Woosnam & Smith, for Martin Woosnam, Newtown, for the appellant; Hurd & Son, for Williams, Gittins, & Taylor, Newtown, for the respondents; Busk, Mellor, & Morris for E. Powell, Newtown, for Severn Tweed Company.*

Also reported in (1900) 1 Q. B. 478; 69 L. J. Q. B. 182; 81 L. T. 770; 48 W. R. 228; 64 J. P. 53; 16 T. L. R. 105.

## RIXSOM *v.* PRITCHARD AND RENWICK.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 250.

*A Building—Separate Erections.*—SEC. 7, 1.

**The fact that a building less than 30 feet in height communicates with an adjoining building which is over 30 feet in height, the same business being carried on in the two buildings, does not bring the former within the Act.**

THIS was an appeal by the employers from an award of the Judge of the County Court of Kent, holden at Dartford, in an arbitration under the Workmen's Compensation Act, 1897. In the High Street at Dartford, next to the Bull Inn, which was a building over 30 feet in height, there stood two buildings less than 30 feet in height, which were formerly shops. The wall between the inn and the nearer of the two buildings was a party wall. The two buildings had been acquired by the landlord of the inn, and a communication had been made between the inn and the nearer building, which was called the beerhouse. The landlord had recently determined to demolish the two low buildings for the purpose of extending the main building of the inn. This work was undertaken by the employers, and the applicant, in the course of his employment, was wheeling some rubbish from the houses which were being demolished when he fell and sustained injuries. The sole question in the case was whether the applicant was employed on, in, or about a building which exceeded 30 feet in height and was being domolished within the meaning of sec. 7, sub-sec. 1, of the Workmen's Compensation Act. The County Court Judge held that because the beerhouse was connected with the inn the case came within the Act, and made an award in favour of the applicant.

Mr. *F. Low* appeared for the employers in support of the appeal; Mr. *Cyril Dodd*, Q.C., and Mr. *Bassett Hopkins* for the applicant.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the only question the Court had to consider was whether the notes of the evidence taken before the County Court Judge contained any evidence that there was at the time of the accident a building over 30 feet in height which was being demolished. It was clear to him that they did not. The applicant was engaged in pulling down the beerhouse, which was less than 30 feet in height. The only building which was over 30 feet in height was the Bull Inn, and that was not being demolished at all. No part of the building which was being demolished exceeded 30 feet in height. The communication between the beerhouse and the inn did not make the smaller building a part of the larger building.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Also reported in (1900) 1 Q. B. 800; 69 L. J. Q. B. 494; 82 L. T. 186; 16 T. L. R. 250.

Consult "The Case Law of the Workmen's Compensation Act, 1897," 2nd Edition (1900).

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## FRID *v.* FENTON.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 267.

*Building being "constructed."*—SEC. 7, 1.

A building is in course of construction within the Act until the scaffolding has been taken down.

THIS was an appeal from the award of Sir W. L. Selfe, the Judge of the Rochester County Court, under the Workmen's Compensation Act, 1897. The respondent on the appeal was

in the employment of the appellant, who was constructing a shaft at the cement works of Messrs. Francis and Co., at Cliffe. The respondent was employed as a bricklayer on the work. The shaft was a brickwork erection 100 feet high, resting upon cement foundations. The shaft was built at the top of a perpendicular bank or precipice about 20 feet high. For the purpose of doing the work it was necessary to erect a staging from the lower level to the top of the foundations. This staging was about 20 feet in height from the lower level to the top of the cement foundations, and was constructed in the manner in which a scaffolding was usually constructed—namely, by poles, ledgers, and putlogs. At the top of the staging, on a level with the top of a cement foundation, boards were laid to form a flooring. The only access to the work was by means of the staging and from it through an opening left at the bottom of the brickwork of the shaft. The materials used in the construction of the shaft were brought in at the bottom of the shaft through the staging and were hauled up the shaft by means of a winch on the lower level and a pulley with a rope running through the pulley on the top of the shaft. The construction of the brickwork of the shaft was done by means of scaffolding erected upon putlogs inside the shaft, the putlogs being supported by being placed through apertures left in the brickwork, and this scaffolding and the putlogs on which it rested were raised from time to time, as the building arose, at intervals of 5 feet. On June 8, 1899, the day before the accident, the construction of the brickwork of the shaft had been completed, and the scaffolding inside the brickwork and the gear used in the construction had been removed and brought down to the staging; the opening at the bottom of the shaft, which had been used for access to the shaft and for taking in the materials, was bricked up; and the shaft was in working order and in actual use, with the exception that a lightning conductor, which had been run from the top of the shaft, required a copper plate to be fixed on the end of it and buried in the ground at the lower level. On June 9 the respondent was engaged in

removing gear, which had been used in the construction of the shaft, from the staging erected outside the shaft when he stepped upon a plank which tipped up, and in consequence he fell about 20 feet and was injured. The County Court Judge held that the shaft was a "building" within sec. 7 of the Workmen's Compensation Act, 1897, and that it was, at the time of the accident, being constructed by means of a scaffolding—namely, the staging erected from the lower level to the top of the foundations of the shaft. In his opinion the staging, which was erected for the purpose of giving access to the shaft and bringing up materials for its construction, was a "scaffolding" within the Act, and the building was at the time of the accident being "constructed," because the building could not be said to be completed until the scaffolding was removed, the removal of the scaffolding being part of the work of construction. He accordingly made an award in favour of the respondent for 10*s.* 7*d.* a week.

Mr. *A. Powell*, for the appellant, contended that the shaft was not being "constructed" at the time when the accident happened. It had been completely finished, and was in actual use. It was not like a house with a scaffolding round it, when it might well be said that the house was not constructed until the scaffolding was removed. There was no construction going on here. This scaffolding was below the shaft, used merely for the purpose of bringing up materials to the upper level for the construction of the shaft. It might have remained where it was for other purposes long after the shaft was finished and in use. The County Court Judge was therefore wrong.

Mr. *A. J. Tassell*, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, the learned County Court Judge was right. In order to build the shaft it was necessary to go down to a lower level than that on which the shaft was to stand, and to erect a scaffolding on the lower level up to the foundations of the shaft for the purpose of bringing up materials for the construction of the

shaft. It was necessary afterwards to get down the scaffolding outside as well as inside the shaft. It was said that the accident did not arise in the course of employment on a building exceeding 30 feet in height which was being "constructed" by means of a scaffolding. In his opinion the job had not been finished. The "construction" was not finished until the scaffolding was taken down. If a builder agreed to build a house, could it be said that the construction of the house was finished before the scaffolding was taken down? Clearly not. The Judge was therefore right.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER agreed.

Solicitors: *Lewin & Birdseye, for R. Page, Manchester, for the appellant; A. Booth Hearn, Chatham, for the respondent.*

Also reported in 69 L. J. Q. B. 436; 82 L. T. 193; 16 T. L. R. 267.

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## MAUDE *v.* BROOK.

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

16 *T. L. R.* 164.

*Scaffolding.*—SEC. 7.

Loose trestles, with boards laid across them to enable plasterers to get to the top of the walls and ceilings of a room, amount to some evidence of "scaffolding" (Collins, L.J., diss.).

THIS was an appeal from the award of Judge Greenhow, the Leeds County Court Judge, in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Anne Maude, was the widow of a workman, Jeremiah Maude, who at the time of the accident was in the employment of the appellant, J. Herbert Brook. The case raised two questions—first, whether the deceased man was employed in the "construction" of a building; and, secondly, whether the building was being constructed by

means of a "scaffolding" within the meaning of sec. 7, sub-sec. 1, of the Workmen's Compensation Act, 1897. The appellant, who was a master plasterer, was building two villas in November, 1898, and the deceased man was employed with other workmen on the inside plastering work of the villas. As will be seen below, it was disputed that the appellant was himself building the villas, but the Court said that it must be taken that the appellant was the builder. The villas were more than 30 feet high. To enable the plasterers to get up to the top of the walls and ceilings of the rooms loose trestles with boards laid across them were used. The trestles were about 4 feet high, and some of the workmen were at the time of the accident working on the trestles. The deceased man was, on November 24, 1898, standing on the top landing of one of the houses, but not on a trestle, plastering the walls and smoothing the plaster down with a hand "float." By some means, of which no evidence was given, he fell over the staircase, where the banisters had not then been put up, and was killed. At the time of the accident the house had been roofed in, and the outside scaffolding had been taken down, but the inside plastering work had not been completed. The respondent having claimed compensation under the Act, the appellant in his answer stated that he denied liability to pay compensation upon the ground that "the employment of the said Jeremiah Maude was not an employment to which the Act applies." At the conclusion of the evidence before the County Court Judge it was submitted on behalf of the present appellant that there was nothing being constructed or repaired by means of a scaffolding; that the trestles and boards did not constitute a scaffolding; that the building was complete, the roof being on; and that plastering was not part of the construction of a house. *Wood* v. *Walsh* ([1899] 1 W. C. C. 68) was referred to. The County Court Judge was of opinion that the plastering of the walls and ceilings of the unfinished house was part of its construction, and that the arrangement of trestles and boards, although inside the house, was a "scaffolding" within the Act. It formed a platform used by

the workmen engaged in the higher plastering to reach their work. Although the deceased man was not using the scaffolding himself and did not fall from it, he (the County Court Judge) was of opinion that the deceased man died from injury by accident arising out of and in the course of his employment in a building exceeding 30 feet in height (which was not contested) which was being constructed by means of a scaffolding, and that his widow was entitled to compensation. He accordingly made an award in her favour for £296. The appellant gave notice of appeal upon the grounds:—(1) That the employment of the deceased was not an employment to which the Workmen's Compensation Act, 1897, applied; (2) that the appellant was not the undertaker within the meaning of the Act; and (3) that there was no evidence in support of the findings of the County Court Judge.

Mr. *Ruegg*, Q.C. (Mr. A. Powell with him), for the appellant, said that there was one ground of appeal—namely, that the appellant was not the "undertaker" within the meaning of sec. 7 of the Workmen's Compensation Act, 1897. The point was that the appellant was not the builder of these houses, but merely a master plasterer who did the plastering work, and, therefore, did not come within the definition of "undertakers" in sec. 7, sub-sec. 2, which meant, in the case of a building, "the persons undertaking the construction, repair, or demolition." It was said that that point was not taken before the County Court Judge.

Mr. *J. A. Compston*, who appeared for the respondent, said that in his opening statement to the County Court Judge, as appeared from the Judge's notes, he said that the appellant was building the two houses, and as that did not seem to be disputed no evidence was called upon it. The point was not specifically raised in the answer to the claim for compensation, nor was it taken before the County Court Judge. If it had been taken before the Judge, he was instructed that the respondent could have called evidence to the effect that the appellant was building these houses himself upon his own land.

Mr. *Ruegg* said that the answer of the appellant to the claim for compensation raised the point, because it raised every condition necessary to bring the employment within the Act, one of the conditions being that the employment must be by the person undertaking the construction of the building. It was not necessary to take it before the County Court Judge, because it lay upon the respondent to bring his case within the Act, and it was open now to the appellant to show that the respondent had not done so.

LORD JUSTICE A. L. SMITH.—We do not think that the appellant can raise that point now. It was open to him to raise it before the County Court Judge, but he did not do so. If he had raised it there the respondent could have called evidence with the view of showing that the appellant was himself building these houses. That being so, the point is not open now.

Mr. *Ruegg* said that the two other questions were whether, at the time of the accident, the building was being "constructed," and, if so, whether it was being constructed by means of a "scaffolding." It was not now contended that plastering could not be construction, it being a question of fact for the Judge in each case. But the building was not being constructed by means of a "scaffolding." The Legislature never intended two trestles and a board across the top placed inside a room to be a "scaffolding." The word "scaffolding" was used in its ordinary and popular sense as a structure of poles, uprights, boards, etc., fastened together. It must, as Lord Justice Collins said in *Hoddinott* v. *Newton Chambers & Co.* ([1899] 1 W. C. C. 62), be interpreted by reference to the nature of the work for which the Legislature contemplated that it was to be used; that was, the construction, repair, or demolition of a building, exceeding 30 feet in height, as a whole. No one would in ordinary language say that these trestles and boards were a scaffolding. The danger contemplated was that incidental to dealing with a building more than 30 feet high by means of a scaffolding adequate to such a building. The learned Judge was therefore wrong.

Mr. *A. Powell* followed on the same side. The scaffolding must be one necessary for the particular building under construction. The building 30 feet high was the dominating element. The scaffolding must be of such a height and of such a nature as to enable the building 30 feet high to be constructed. Why otherwise should a *minimum* height of 30 feet be fixed for the building? It seemed that the provision as to the scaffolding and the building 30 feet in height came from the schedule to the Notice of Accidents Act, 1894, and sec. 23, sub-sec. 2, of the Factory and Workshop Act, 1895.

LORD JUSTICE COLLINS: Would a board placed across two chairs in a drawing-room be a scaffolding? The Legislature could not have intended such an arrangement to be a scaffolding.

Mr. *J. A. Compston*, for the respondent, contended that there was evidence upon which the County Court Judge could find that the arrangement of trestles and boards was a scaffolding. It was a question of fact in each case for the Judge. It was necessary to have some sort of scaffolding in the room to do the plastering work, and as it was impossible to have an ordinary scaffolding with poles, an arrangement of trestles and boards was used. It was a mere question of convenience which was used. A plasterers' scaffolding was well known in the trade. He referred to the definition of "trestle" in Webster's Dictionary and in the Century and Imperial Dictionaries.

Mr. *Ruegg*, Q.C., replied.

The COURT dismissed the appeal, LORD JUSTICE COLLINS dissenting.

LORD JUSTICE A. L. SMITH said that they must take it that the appellant was the builder of these houses. They were not completed, and the deceased man was engaged in doing plastering work. In his opinion the County Court Judge was justified in holding that at the time of the accident the building was being "constructed." The next question was whether the building was being constructed by means of a "scaffolding." The Act required that the building should be

30 feet high, but there was nothing in the Act requiring the scaffolding to be 30 feet high, nor anything limiting the accident to a fall off the scaffolding. It had been held that it was immaterial whether the scaffolding was inside or outside the building. Suppose a house was being built by means of trestles and boards outside, with a ladder to give access thereto, would not a County Court Judge be entitled to find that the house was being constructed by means of a scaffolding? This Court had always refused to give a definition of the word "scaffolding." The Court could only say in each case whether there was any evidence to entitle the County Court Judge to find that the arrangement was a scaffolding. It seemed to him that if trestles and boards were used outside a house for the purpose of constructing it, there would be evidence that the trestles and boards formed a scaffolding. He could not say as a matter of law that if they were used inside the house for the purpose of completing it they were not a scaffolding. There was nothing in the Act requiring the scaffolding to be one composed of poles and supports. Therefore he could not say that there was no evidence to justify the County Court Judge in finding that this arrangement was a scaffolding. A good many examples of possibly ridiculous results from so holding were put in the argument. All he could say was that in his experience of construing the Act during the last year and a quarter there had been some apparently ridiculous results following from the language used in the Act. But there was the Act. In his opinion the appeal should be dismissed.

Lord Justice Rigby concurred. In his opinion, in construing the Act, they were not at liberty to confine the word "scaffolding" to the most usual form of scaffolding. A thing might be a scaffolding whether it was a usual or an unusual arrangement. A thing might well be a scaffolding though no poles were used in it.

Lord Justice Collins said that he regretted that he was unable to agree with his brethren. He could not do so consistently with his judgment in *Hoddinott* v. *Newton, Chambers,*

*& Co.* Having carefully reconsidered the matter, he adhered to what he had said in that case, and he did not think it necessary to repeat it. The only safe rule was to give to the words in question their ordinary popular meaning. The words must be read with their context. He could not think that a board placed upon two trestles in a room came within the word "scaffolding" as used in this section. He did not think that any ordinary uninstructed person would call that scaffolding. Certainly he did not think such a person would call it scaffolding by means of which a building was being constructed, repaired, or demolished. The connection in which the word "scaffolding" occurred in the section pointed to something in the nature of a scaffolding of poles and supports used in the construction, repair, or demolition of a building. In his opinion, it was not a question of pure fact. The Court must accept the responsibility of giving some guidance as to what would come within the word "scaffolding" without attempting to define its exact meaning. In *Hoddinott* v. *Newton, Chambers, & Co.*, he attempted to state the considerations which should be taken into account in ascertaining whether a particular thing was or was not a scaffolding. It seemed to him that his view was supported by the decision in *Wood* v. *Walsh* ([1899] 1 W. C. C. 68). There the workmen, who were painting the outside of a house, used ladders for the purpose, and a board was tied at one end to a rung of one of the ladders, the other end resting on a window-sill. If the trestles and boards were a scaffolding in the present case, he did not see why the arrangement in *Wood* v. *Walsh* was not also a scaffolding. Lord Justice A. L. Smith in that case said that the ladder was not a scaffolding, and that as to the arrangement of a plank attached to a rung of the ladder whether it was a scaffolding was a question of fact, and the arbitrator found that it was not, and he agreed with him. In *Hoddinott* v. *Newton, Chambers, & Co.* ([1899] 1 W. C. C. 62), there was an arrangement of scaffold boards resting on ledgers secured to iron columns inside a building. Lord Justice A. L. Smith thought that there was evidence that the

arrangement was a scaffolding, though it was not necessary to decide the point. He (Lord Justice Collins) was of opinion that it was not a scaffolding, and he thought that Lord Justice Romer took the same view as he did, because the Lord Justice said that the words construction, repair, and scaffolding, should not be considered separately, but together, for they had a mutual bearing upon each other. That case afforded some guidance as to what was a scaffolding. The result of holding this arrangement of trestles and boards to be a scaffolding would be strange indeed. It was admitted that the decision would cover the case of a workman employed on the building away from the scaffolding. It must follow that if a house was completed except the inside plastering, and if only one plasterer was on a board placed upon two trestles finishing the plastering of a room, another workman, who stumbled when going upstairs and was injured, could claim compensation under the Act. That would be a strange result. The word "scaffolding" meant, in his opinion, one system of scaffolding, capable of being used for the whole of the construction or the whole of the repair of the building.

LORD JUSTICE A. L. SMITH said that he wished to make one observation. In *Hoddinott* v. *Newton, Chambers, & Co.* he had merely said that, in his opinion, there was evidence upon which the County Court Judge was entitled to find that the structure was a scaffolding. So also in *Wood* v. *Walsh,* he merely declined to interfere with the finding of the County Court Judge.

Solicitors: *W. Hurd & Son, for H. A. Child, Leeds, for the appellant; G. Trenam, for Milling & Dodgson, Leeds, for the respondent.*

Also reported in (1900) 1 Q. B. 575; 69 L. J. Q. B. 322; 82 L. T. 39; 48 W. R. 290; 64 J. P. 181; 16 T. L. R. 164.

Consult *Hoddinott* v. *Newton, Chambers* (1899) 1 W. C. C. 62; and the cases there referred to.

## HADDOCK *v.* HUMPHREY.

Before A. L. SMITH, RIGBY, and COLLINS, L.JJ.

16 *T. L. R.* 142.

*Wharf.*—SEC. 7, 2.—*Factory and Workshop Act*, 1895, *sec.* 23.

A wharf is a place contiguous to water over which goods pass in the process of loading and unloading (Rigby, L.J., diss.).

A yard used for storing timber was situate on the far side of a quay or wharf, which ran 150 yards from the water's edge. Between the quay or wharf and the yard, there was first a public road, then a fence, and lastly, some timber-merchant's offices.

*Held* (Rigby, L.J., diss.), that the yard was not a wharf.

THIS was an appeal from an award of the Judge of the Lancashire County Court, sitting at Liverpool, in an arbitration under the Workmen's Compensation Act, 1897. The applicant was the widow of a workman who had been killed by an accident in the course of his employment. The employers were Messrs. W. & T. Humphrey, who were carters. At the time of the accident the deceased man was engaged in the work of removing a log of timber from a pile of logs and loading it on one of the respondents' carts, the respondents having arranged with a firm of builders, who had bought the log, to remove it from the place where it was stored. The only question in the case was whether the place where the timber was stored was a wharf, so as to come by virtue of sec. 23 of the Factory and Workshop Act, 1895, within the definition of "factory" contained in sec. 7 of the Workmen's Compensation Act. The *locus in quo* was a timber-yard, which was distant about 150 yards from the water of the Canada Dock, at Bootle. Alongside the water was a large space called the timber-quay, which stretched back from the water for a distance of nearly 150 yards, and

beyond this, running parallel with the water, was a cart-road, which was used by the public. On the further side of this road was a line of offices, to each of which was attached a yard. These offices and yards were leased by the Mersey Docks and Harbour Board to various timber merchants. It was in one of these yards that the timber in question was stored. The area comprising these offices and yards was enclosed by a wall and gates. On the further side of this area ran a highway called Regent's Road, and beyond this again there were similar offices and yards. The County Court Judge held that the *locus in quo* was not a wharf, and made an award in favour of the employers. The applicant appealed.

Mr. *Blackwood Wright* appeared for the appellant, and urged that the learned County Court Judge in effect treated "wharf" and "quay" as being identical. But sec. 23 of the Factory and Workshop Act, 1895, spoke of "every dock, wharf, quay, and warehouse"; and each of these words ought to have a distinct meaning given to it. He contended that a quay was a place for discharging cargo and a wharf was a place for storing cargo. He referred to *Hall* v. *Snowden, Hubbard, & Co.* ([1899] 1 W. C. C. 73).

Mr. *Joseph Walton*, Q.C., and Mr. *Leslie Scott*, for the respondents, argued that the County Court Judge was right in holding that this place was not a wharf. A wharf might be a store, but a store need not be a wharf. A wharf, according to its ordinary meaning, was a place alongside water used for unloading. The only difference between "wharf" and "quay" was that "quay" was a species of "wharf." They referred to the Century Dictionary, in which "wharf" is defined as follows:—"A platform of timber, stone, or other material built on a support at the margin of a harbour or a navigable stream, in order that vessels may be moored alongside, as for loading or unloading, or while at rest. A wharf may be parallel with and contiguous to the margin, when it is more especially called a quay; or it may project away from it, with openings

underneath for the flow of water, when it is distinctively called a pier."

The COURT (LORD JUSTICE RIGBY dissenting) dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether this place was a wharf or a timber-yard. The County Court Judge held that it was a timber-yard and not a wharf, and he thought the County Court Judge was right. In his opinion the word "wharf" implied some connexion with water, and he could not think that it could include a yard which was cut off from a quay in the way in which this yard was cut off. If it could, then he saw no reason why it should not also be held to include the yards on the further side of Regent's Road. He thought the appeal should be dismissed.

LORD JUSTICE RIGBY said he was unable to arrive at the same conclusion as his learned brethren. In his opinion the word "wharf" did not necessarily imply anything to do with water. It was derived from an Anglo-Saxon word, and there were similar words in cognate languages. It seemed to mean a place for the reception of goods, and not specially a place for the unloading of goods. He thought that the place in question was a wharf.

LORD JUSTICE COLLINS said he was of opinion that the County Court Judge was right. He thought the only safe standard to apply to the interpretation of the words used in sec. 23 of the Factory and Workshop Act, 1895, was to give each of these words its ordinary popular meaning. Any attempt to refine on the meanings of these words seemed to him to be likely to be fraught with difficulty. In a previous case they had given the word "dock" its popular meaning, *Hennessey* v. *McCabe* (*post*, p. 80). And so here he thought they ought to give "wharf" its popular meaning. In his opinion the *locus in quo* here could not be described as a wharf at all. It was contiguous to a wharf, but it was a place in which an individual timber-merchant was entitled to store timber. He did not doubt that if it had been roofed

over it would have been a warehouse; but it was not a wharf.

Solicitors: *W. H. Quilliam, for the appellant; J. R. Watkins, for the respondents.*

Also reported in (1900) 1 Q. B. 609; 69 L. J. Q. B. 327; 82 L. T. 72; 48 W. R. 292; 64 J. P. 86; 16 T. L. R. 142.

Consult *Hall* v. *Snowden* (1899) 1 W. C. C. 73, and "The Case Law of the Workmen's Compensation Act, 1897." Second Edition (1900).

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## HENNESSEY v. McCABE.

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 77.

*Dock—Loading therefrom or thereto.*—SEC. 7, 2.—*Factory and Workshop Act*, 1895, *sec.* 23.

Loading a ship in a dock from a lighter is not loading from or to a dock.

THIS was an appeal from an award of the Judge of the Bow County Court under the Workmen's Compensation Act, 1897. The applicant was a stevedore's labourer, and he claimed compensation from his employer, a stevedore, for accidental injuries sustained by him in the course of his employment. At the time of the accident the applicant was on board a ship which was lying in dock in the port of London, and was engaged in loading the ship with cargo from a lighter by means of a steam winch which was attached to the ship. The lighter was lying alongside the ship, the ship being between the lighter and the quay. The County Court Judge made an award in favour of the applicant. The employer appealed, and the only question raised on the appeal was whether the employment on which the applicant was engaged at the time of the accident was an employment to which the Act applied.

Mr. *Ruegg*, Q. C., and Mr. *Roskill* appeared for the employer,

and contended that this was not an employment to which the Act applied. By sec. 7, sub-sec. 1, of the Workmen's Compensation Act, "This Act shall apply only to employment by the undertakers as hereinafter defined, on, or in, or about," among other things, "a factory." By sub-sec. 2, "factory" includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. By sec. 23 of the Factory and Workshop Act, 1895, it was enacted that certain provisions of the Factory Acts, relating to the fencing of machinery, notice of accidents, powers of inspectors, and dangerous employments, should have effect "as if every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process, and any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connexion with a building, were included in the word factory . . . and the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory." The word "factory" thus had an artificial meaning given to it for the purpose of the Workmen's Compensation Act, and under certain circumstances machinery might be a factory, and the person who used the machinery the occupier of a factory. But this was the case only where the machinery satisfied one or other of two conditions. It must be either machinery for loading or unloading from or to a dock, wharf, quay, or warehouse, or machinery used temporarily for the purpose of building. *McNicholas* v. *Dawson* ([1899] 1 W. C. C. 80) was a case of machinery temporarily used for the purpose of the construction of a building. That case did not in any way touch the present. The only way in which this case could be brought within the Act would be by showing that this steam winch was machinery which was being used in the

process of loading to or from a dock. The facts, however, showed that the cargo here was not being loaded to or from a dock, but was being loaded from a lighter into a ship. The County Court Judge said that he had based his decision on *Woodham* v. *Atlantic Transport Company* ([1899] 1 W. C. C. 52), but that case did not really govern this case. There cargo was being unloaded from a ship by means of a crane which was standing on a quay, and the Court held that the case was within the Act because machinery was being used in the process of unloading to a quay. In the present case there was no loading or unloading to or from a dock or quay, and therefore the case was not brought within the Act. They referred also to *Flowers* v. *Chambers* ([1899] 1 W. C. C. 51), in which it was held that employment on board a ship lying in a dock was not employment on, in, or about a dock; and to *Hall* v. *Snowden* ([1899] 1 W. C. C. 73) and *Durrie* v. *Warren & Co.* ([1899] 1 W. C. C. 78).

Mr. *Montague Lush*, for the applicant, said he admitted that the case depended on the question whether this steam winch was machinery and plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse within the meaning of sec. 23 of the Factory and Workshop Act, 1895. He contended that it was machinery so used, and that the County Court Judge was right. The cargo in this case was being loaded from the dock. He was not suggesting that the lighter out of which the cargo was taken was a part of the dock, for this Court had already negatived that proposition; but he contended that loading the cargo from the lighter into the ship was loading from the dock. It was the ordinary way of loading a cargo from a dock to make use of lighters. The lighters, though not part of the dock, were part of the plant used for the operation of loading. If cargo was brought down to a quay in a cart and loaded from the cart into a ship, it would be none the less loaded from the quay because it was taken from the cart on the quay. The cart would not be the quay, but the loading would be a loading from the quay. If the argument on the other side

was right, the word "dock" might as well be struck out of the section; for, according to their contention, there could not be a loading from a dock which was not a loading from a quay or wharf.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the case had been well argued on both sides. The question was, whether a steam winch on board a ship lying in a dock used for the purpose of taking in cargo from a lighter was a factory within the meaning of the Workmen's Compensation Act. It was necessary to consider the incorporation into the Workmen's Compensation Act of enactments determining what constituted a factory. No case which they had previously decided covered the present. But in *Flowers* v. *Chambers* they held that a ship lying in a dock was not a dock, and in *Durrie* v. *Warren & Co.* they went a long way in the direction in which they were going to-day. His Lordship read sec. 7, sub-secs. 1 and 2, of the Workmen's Compensation Act, and sec. 23 of the Factory and Workshop Act, 1895. The question was whether the steam winch in this case was machinery or plant used in the process of loading or unloading from or to any dock, wharf, quay, or warehouse, within the meaning of sec. 23 of the Act of 1895. It seemed to him that the steam winch was used for the purpose of loading cargo from a lighter which was lying alongside a ship into the ship, and not for the purpose of loading to or from any dock, wharf, quay, or warehouse. He thought it would be straining the section beyond all reasonable bounds to hold that loading from a lighter into a ship on which a steam winch was used was loading from a dock, wharf, quay, or warehouse. The case, therefore, did not come within the Act, and the appeal must be allowed.

LORD JUSTICE COLLINS agreed. He felt some difficulty in the case, and it seemed to him that Mr. Lush was logical and probably right in his interpretation of the word "dock" as embracing both the land bounding the water and the water itself. But he thought that the expressions "loading from a

dock" or "unloading to a dock" must be taken to have the meaning which nine out of ten persons would attach to them—viz. as describing a process which involved some use of the land bounding the water. In his opinion the machinery used in this case did not constitute a factory. That question depended on the true construction of sec. 23 of the Factory and Workshop Act, 1895; and the effect of that section was to make the word "factory" include machinery only in certain circumstances, which, as it seemed to him, did not cover the circumstances existing in the present case.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

Solicitors: *Richard White, for the applicant*; *W. Hurd & Son, for the employer.*

Also reported in (1900) 1 Q. B. 491; 69 L. J. Q. B. 173; 81 L. T. 575; 48 W. R. 231; 64 J. P. 4; 16 T. L. R. 77.

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## TURNBULL *v.* LAMBTON COLLIERIES (LIMITED).

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 369.

*On, in, or about a mine—Adjacent to and belonging to a mine.*—SEC. 7.—*Coal Mines Regulation Act,* 1887, *sec.* 75.

The words "adjacent to and belonging to the mine" in sec. 75 of the Coal Mines Regulation Act, 1887, mean adjacent to and belonging to the particular mine in question.

A private railway, 12 miles long, used by colliery owners to collect the output from various mines belonging to them is not within the Act.

THIS was an appeal from the award of the Durham County Court Judge under the Workmen's Compensation Act, 1897. The respondent on the appeal, Frances Turnbull, was the widow of a deceased workman, John Thomas Turnbull, who

was killed by an accident arising out of, and in the course of, his employment. The appellants, the Lambton Collieries (Limited), owned a number of collieries, among them being one called the Burnmoor Colliery. They also owned a private railway called the Lambton railway, about 12 miles in length, which connected the various collieries with the North-Eastern Railway Company. The deceased man was an engine driver in the employment of the appellants, and upon the day of the accident he was engaged in driving a train containing coal from the Burnmoor Colliery to the coal depôt belonging to the appellants next the North-Eastern Railway Company, where the coal from the collieries was stored, and from which the coal was distributed to purchasers. When the train arrived at a point three-quarters of a mile from the pit's mouth of the Burnmoor Colliery, near the junction of a siding belonging to the appellants and leading to the coal depôt, the deceased man, who was standing on the footboard of the engine leaned too far out from the engine, and in consequence his head struck against some waggons standing on the siding, and he was killed. The railway at the place where the accident happened ran parallel with the North-Eastern Railway Company. The accident occurred on the through running line of the Lambton railway. The Lambton railway was held and maintained by the appellants, under wayleave leases granted to them by the owners of the land upon which the railway stood, and was not constructed or carried on under the powers of any Act of Parliament, or used for the purposes of public traffic. It was under the sole control of the appellants, and was used only for the conveyance of its place of delivery of mineral traffic belonging to them and arising at their various collieries, and not for the purposes of any one colliery only. It was the sole means by which coals were conveyed away from the collieries. The depôt to which the train which the deceased was driving was conveying coals was used for selling coals produced at the appellants' collieries to the public in the neighbourhood, and also for supplying such

coals to workmen employed at the various collieries belonging to the appellants. The County Court Judge decided in favour of the respondent on the ground that, in his opinion, the accident occurred "on" the appellants' works and adjacent to their Burnmoor mine. By sec. 7, sub-sec. 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine. . . ." By sub-sec. 2, "'Railway' means the railway of any railway company to which the Regulation of Railways Act, 1873, applies. . . . 'Mine' means a mine to which the Coal Mines Regulation Act, 1887, . . . applies." By sec. 75 of the Coal Mines Regulation Act, 1887, "In this Act, unless the context otherwise requires, 'Mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine."

Mr. *Scott Fox*, Q.C., and Mr. *H. Manisty*, for the appellants, contended that there was no evidence upon which the County Court Judge could find that the accident occurred "on" the mine as defined by sec. 75 of the Coal Mines Regulation Act, 1887.

Mr. *Robson*, Q.C., and Mr. *Danckwerts*, Q.C., for the respondent, contended that the siding where the accident happened was by sec. 75 of the Act of 1887 made part of the mine, and therefore the accident happened "on or in or about" the mine.

The Court allowed the appeal.

Lord Justice A. L. Smith said that the place where the accident happened was not a "railway" within the definition in sec. 7, sub-sec. 2, of the Act of 1897. It was said that the accident happened "on or in or about" a mine. To find the definition of "mine" sec. 75 of the Act of 1887 had to be looked at. Apart from the definition in sec. 75 of the Act of 1887, the accident clearly did not happen "on or in or about" the mine, because it happened three-quarters of a

mile away from the mine. There remained the question whether the meaning of the word "mine" was enlarged by sec. 75 of the Act of 1887 so as to include this spot three-quarters of a mile away. The words in that section, "adjacent to and belonging to the mine," meant physically adjacent to and belonging to the mine itself, and not merely belonging to the mine owner. In his opinion there was no evidence upon which the County Court Judge could find that the spot where the accident happened was adjacent to and belonging to the mine.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

LORD JUSTICE ROMER agreed.

Solicitors: *Rowcliffes, Rawle, & Co., for Cooper & Goodger, Newcastle-on-Tyne, for the appellants; H. S. Harris & Co., for Isidore Isaacs, Sunderland, for the respondent.*

Also reported 82 L. T. 589; 64 J. P. 404; 16 T. L. R. 369.

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## CASS *v.* BUTLER.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 227.

*Undertakers—Sub-contractor.*—SEC. 7, 2.

A sub-contractor with an "undertaker" is not an "undertaker" within the Act.

THIS was an appeal from the decision of Judge Greenhow, the Leeds County Court Judge, in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Ann Cass, was the widow of Henry Cass, who, at the time of the accident, was a painter in the employment of the appellant, and she claimed compensation under the Act on behalf of herself and her children, and also

on behalf of Cass's mother. It appeared that a builder and contractor named Isaac Gould had entered into a contract to build and complete an electrical station. Gould then entered into a sub-contract with the appellant, who was a painter, that the latter should do the whole of the painting work of the building. The building was being constructed by means of a scaffolding, and was over 30 feet in height. On June 17, 1899, Cass was engaged in painting the iron girders of the roof, and was standing on the scaffolding belonging to Gould, which was used in the erection of the building. While Cass and another man named Crowther, also in the employment of the appellant, were so engaged a plank broke and they fell and were killed. It was admitted that this new building was being painted for the first time. The County Court Judge held that the appellant was an "undertaker" within the meaning of the Act, and that the painting of the new building was "construction," and he made an award of £235 6*s.* in favour of the respondent. By sec. 4 of the Workmen's Compensation Act, 1897, "Where, in any employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman . . . by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." By sec. 7, sub-sec. 2, the term "undertakers" is defined to mean, in the case of a building, "the persons undertaking the construction, repair, or demolition."

Mr. *Ruegg*, Q.C., and Mr. *A. Powell*, for the appellant,

contended that the appellant was not an "undertaker" within the meaning of the Act. The contractor, Gould, was the undertaker, as he was "undertaking the construction" of the building within the definition of "undertakers" in sec. 7, sub-sec. 2. A sub-contractor was not an undertaker. Sec. 4 clearly showed that the contractor was liable as the undertaker, though he might be entitled to be indemnified by the sub-contractor. This was not like the case of *Mason* v. *A. R. Dean* (*Limited*) (*post*, p. 91), where different contractors agreed with the building owner to do separate parts of the construction, and in that case the Court held that each contractor was an undertaker. In the present case one contractor agreed with the building owner to do the whole of the work, and he sub-contracted with the appellant for the painting work. The appellant was therefore not liable. Secondly, painting was not "construction." In *Wood* v. *Walsh & Sons* ([1899] 1 W. C. C. 68) it was held that painting the outside of an old house was not "repair." There was no distinction between that case and the present. The decision of the County Court Judge was therefore wrong.

Mr. *Temple Franks*, for the respondent, contended that there was nothing in the Act to show that a sub-contractor could not be an "undertaker." In *Mason* v. *A. R. Dean* (*Limited*) it was decided that there could be several undertakers in respect of the construction of one building. If that were so, a sub-contractor could be an undertaker, and whether he was so or not was a question of fact in each case. The County Court Judge found that in this case the appellant was an undertaker, and no appeal lay from his finding. Sec. 4 was not against the respondent. That section merely provided a remedy against the contractor in addition to that against the sub-contractor. If the sub-contractor was a man of straw, then the applicant could proceed against the contractor. That was the object of sec. 4.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the County Court Judge was wrong. Though the Judge's notes

were very meagre, he understood the facts to be these:—Gould was a builder and contractor, and he contracted with the building owner to construct the building. Gould then entered into a sub-contract with the appellant, who was a painter, whereby the appellant contracted with Gould to do the whole of the painting of the building. The appellant employed a man named Cass as a painter upon the painting work of the building. The building was a new one and had never been painted before, and one point taken was that the painting was "construction" within the meaning of sec. 7. That point it was not necessary to determine, because the other point taken was sufficient to decide the case. It was said that the appellant was not an "undertaker" within the Act; that Gould was the undertaker, and that if any one was liable Gould was liable. The question, in other words, was whether a sub-contractor was an "undertaker" within the Act. It was said, on the other hand, that the respondent had the option of suing either the contractor or the sub-contractor, as they were both "undertakers." To his Lordship's mind, this latter contention was not correct. That was not the meaning of the Act. "Undertakers" were defined in sec. 7, sub-sec. 2, so far as material, as meaning persons undertaking the construction, repair, or demolition of a building. In the present case, Who had undertaken the construction of this building? The answer must be, Gould. In *Mason* v. *A. R. Dean* (*Limited*) a firm named Messrs. Moore and Sons had contracted with the building owner for the construction of a theatre, but under powers reserved in Messrs. Moore & Sons' contract the building owner entered into a contract with A. R. Dean (Limited) for the latter to do the decorative work. The deceased man was in the employment of the latter firm, and he was killed while at work on the theatre. The Court held that, as A. R. Dean (Limited) had entered into a contract direct with the building owner to construct part of the building, they were "undertakers" within the Act, and liable as such. That was an entirely different case from the present, where a contractor had agreed

with the building owner to construct the whole building, and had let out part by a sub-contract to a sub-contractor. Sec. 4 was strong to show that a sub-contractor was not an "undertaker" within the Act.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER agreed.

Solicitors: *W. Hurd & Son, for H. A. Child, Leeds, for the appellant; Hamlin, Grammer, & Hamlin, for C. Dunn, Leeds, for the respondent.*

Also reported in (1900) 1 Q. B. 777; 69 L. J. Q. B. 362; 82 L. T. 182; 48 W. R. 309; 64 J. P. 261; 16 T. L. R. 227.

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## MASON *v.* A. R. DEAN (LIMITED)—MOORE & SONS

THIRD PARTIES.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 212.

*Undertakers—Building.*—SEC. 7.

Every person who undertakes the construction of a separate substantial part of a building is an "undertaker" for the construction of the building, and every workman employed by him is within the Act, whatever may be the particular nature of his work.

Where a building is being constructed by several persons, not jointly, but each doing a separate part, each and all of them are "undertakers" within the meaning of sec. 7 of the Workmen's Compensation Act, 1897.

THIS was an appeal from a judgment of the Judge of the County Court of Lancashire, holden at Salford, on a special case stated by an arbitrator, who had been appointed by the County Court Judge to hear an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was Jane Mason, the widow of Frederick William Mason, who had been killed in the course of his employment by a fall from a scaffold. The employers of the deceased man were A. R. Dean (Limited), who carried on business at

Birmingham as furnishers and decorators. The accident happened on February 10, 1899, at the Lyceum Theatre, Eccles, near Manchester. The theatre was then an incomplete building, exceeding 30 feet in height, and it was being constructed by means of a scaffolding. Messrs. Moore and Sons had prior to the date of the accident contracted with the building owner for the construction of the building and for the erection of the scaffolding from which the deceased man fell. Under powers reserved in Messrs. Moore & Sons' contract the architects let off to A. R. Dean (Limited) certain decorative work. The scaffolding used by the deceased and his fellow-workmen was erected by Moore and Sons at the expense of the building owner. At the time of the accident the deceased man was engaged in doing for his employers, A. R. Dean (Limited), part of the work which they had contracted with the building owner to do—namely, painting the ceiling of the theatre. He was walking on the scaffolding when one of the planks gave way, and he fell to the pit floor and was instantly killed. The applicant made the employers respondents to the arbitration, claiming compensation from them. The respondents delivered a defence, in which they denied liability on the ground that the employment of the deceased was not an employment to which the Workmen's Compensation Act applied; and they also alleged that Messrs. Moore & Sons or their workmen erected the defective scaffolding and were the persons responsible for the scaffolding. The respondents delivered to Moore & Sons a notice of claim to indemnity against all liability on account of any accident caused by the scaffolding. At the hearing of the arbitration before the arbitrator appointed by the County Court Judge, it was contended on behalf of the applicant that the respondents were undertakers within the meaning of sec. 7, sub-sec. 2, of the Workmen's Compensation Act, and that they were engaged on work of construction in a building exceeding 30 feet in height, and then being constructed by means of a scaffolding. It was contended on the part of the respondents that the work which they had contracted to do

was not work of construction within the meaning of the Act, and that they were not undertakers within the meaning of the Act. The arbitrator held that the respondents were undertakers, and that they were engaged in the construction of a building exceeding 30 feet in height, such building being then in the course of construction by means of a scaffolding, and he awarded the applicant the sum of £300, with costs. At the request of the respondents the arbitrator stated a case for the opinion of the County Court Judge, submitting the following questions:—(1) Whether the respondents were undertakers in the construction of a building within the meaning of the Act; (2) whether the employment in the course of which the said personal injuries were caused to the deceased workman was employment to which the Workmen's Compensation Act applies. The County Court Judge set aside the award of the arbitrator with costs, on the ground that, though the respondents were undertakers engaged in the construction of a building within the Act, yet the case of *Wood* v. *Walsh & Sons* ([1899] 1 W. C. C. 68) showed that painting the ceiling of the theatre was not an employment within the Act. The applicant appealed.

Mr. *R. W. Harper* appeared for the applicant; Mr. *C. A. Russell*, Q.C., and Mr. *Byrne* for the respondents; and Mr. *Ames* for the third parties.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the respondents were liable in this case. The County Court Judge had held that they were not liable, thinking himself bound so to hold by reason of the decision in *Wood* v. *Walsh & Sons.* But that case really had nothing to do with the present. Messrs Moore & Sons, a firm of builders, had undertaken the work of building a theatre at Eccles. By the terms of the contract the building owner was at liberty to give some portions of the work to other persons, and he accordingly placed a portion of it in the hands of the respondents. While the respondents were carrying out their part of the work the deceased man, who was in their employment and was engaged

in the work, met his death by falling through a scaffolding. The question was whether the respondents were undertakers within the meaning of the Workmen's Compensation Act. The Act only applied to certain classes of employers, as shown by sec. 7, sub-sec. 1. Did it apply to the respondents? It applied to "employment by the undertakers, as hereinafter defined, on, in, or about any building which exceeds 30 feet in height and is either being constructed or repaired by means of a scaffolding or being demolished." Here the building was not completed. The respondents were put on to do certain work which would help to bring it to completion. The contract of the respondents with the building owner showed that the work they had to do included the putting up of a ceiling, the erection of a proscenium, and the fixing the private boxes with columns, caps, etc. No doubt a good deal of the work was decoration pure and simple. But there was ample to show that they had also to perform structural work. The building was over 30 feet high, and it was being constructed by means of a scaffolding. It was clear that the deceased man was employed on a building within the Act. Was he employed by undertakers within the meaning of the Act? By sub-sec. 2 of sec. 7 "undertakers" meant, in the case of a building, the persons undertaking the construction, repair, or demolition. Ought that to be construed as meaning the persons undertaking the construction of the whole building or did it also include the persons undertaking the construction of a substantial part of a building? In his opinion a person who undertook the construction of a substantial part of a building was an undertaker within the Act. He therefore thought that the judgment of the County Court Judge was wrong, and that the applicant was entitled to the compensation which had been awarded to her by the arbitrator.

Lord Justice Collins was of the same opinion. The respondents' specification clearly embraced work which must be described as construction rather than decoration, and the judgment of the County Court Judge could not be supported on that ground. With regard to the other question, it seemed

to him to be immaterial what particular sort of work the workman was doing at the time of the accident. The point to consider was whether his employment was an employment within the Act and whether it was employment by undertakers within the meaning of the Act. Here the respondents were persons undertaking the construction of part of a building, and, in his opinion, they were undertakers within the Act.

LORD JUSTICE ROMER agreed. He thought that where a building was being constructed by several persons, not jointly but each doing a separate part, each and all of them came within the definition of "undertakers" in sec. 7. But only that undertaker was liable to pay compensation in whose employment the workman was at the time of the accident.

Mr. *Ames* said that the third parties had been served with notice of the appeal, and asked that their costs might be allowed.

The COURT refused to make any order as to the costs of the third parties.

Solicitors: *Alfred Bates, for the applicant; Hargreave & Heaton, for the respondents.*

Also reported in (1900) 1 Q. B. 770; 69 L. J. Q. B. 358; 82 L. T. 139; 48 W. R. 353; 64 J. P. 244; 16 T. L. R. 212.

Consult *Stead* v. *Moore* (*post*, p. 96); *Percival* v. *Garner* (*post*, p. 99).

Consult, as to nature of the work on which the injured man was engaged, "Accidents to Workmen," p. 101; *Maude* v. *Brook* (*ante*, p. 69).

## STEAD *v.* MOORE AND OTHERS.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

*The Times, June* 18, 1900.

*Undertakers—Building—Construction.*—SEC. 7, 2.

The whole of the carpentry and joinery necessary for the erection of a building is a substantial part of its construction, and therefore a person who contracts for that work and no other is an "undertaker."

THIS was an appeal from an award of the Judge of the Sheffield County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was the widow of a workman who had met his death in consequence of accidental injuries sustained by him in the course of his employment. It appeared that Messrs. Malthouse & Ward, who carried on business as builders, having acquired a piece of land, determined to build thereon 11 houses. They themselves erected the scaffolding which was to be used in the work of building the houses, and they did all the brickwork and stone work, and they superintended generally the construction of the houses; but they entered into a contract with Enos Moore, a master joiner, that he should do all the carpentry and joinery work. The deceased workman was in the employment of Moore, and while he was engaged in joining work at the houses in question he accidentally fell from the scaffolding erected by Malthouse & Ward and was killed. The applicant took these proceedings under the Act against both Moore and Malthouse & Ward. The County Court Judge found that Moore was an undertaker as defined by the Act, and that the deceased was Moore's servant at the time of the accident, and was employed

by Moore on Moore's work. He also found that Malthouse & Ward were building owners and were not undertakers within the meaning of the Act. And he made an award ordering that Moore should pay £260 as compensation to the applicant and her children. From this award Moore appealed, and it was contended on his behalf that there was no evidence on which the County Court Judge could rightly find that he was the undertaker in the construction of the houses, and that the only true inference to be drawn from the facts proved was that the building owners were themselves the undertakers.

Mr. *Ruegg*, Q.C., and Mr. *Hextall* appeared for Moore in support of the appeal; Mr. *H. W. W. Wilberforce* appeared for the applicant; and Mr. *Danckwerts*, Q.C., and Mr. *Sims* appeared for Malthouse & Ward.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the Court could not interfere with the finding of the learned County Court Judge. Appeals under the Workmen's Compensation Act were limited to questions of law, and if there was any evidence to support the finding of the County Court Judge then the finding ought to be left undisturbed. The controversy before the County Court Judge in this case was whether Moore was the undertaker in the construction of this building or whether Malthouse & Ward were the undertakers. The case of *Mason* v. *A. R. Dean* (*Limited*) (*ante*, p. 91) was referred to, and the County Court Judge, having that case before him, came to the conclusion that Moore was the undertaker. Malthouse & Ward, who were builders, were erecting 11 houses as owners. What part of the work of construction did the evidence show that Malthouse & Ward themselves undertook? Did they undertake the construction of the whole of the building and then sublet a part of the work to Moore? Or was the true view of the evidence that they only undertook the erection of the scaffolding and the walls of the houses, and that Moore undertook a substantial part of the construction—viz. the carpentry and joinery work? That seemed to him to be a question of fact to be determined

by the County Court Judge, and the County Court Judge had determined it by drawing the inference that Malthouse & Ward had only undertaken that part of the work which was in their particular line, leaving a substantial part of the construction, viz. the carpentry and joinery, to be undertaken by Moore. The appeal must, therefore, be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS said that he was of the same opinion. The County Court Judge had found that, so far as the joinery work was concerned, Malthouse & Ward were not undertakers in the construction of these houses, and that Moore was undertaker. It was impossible to say that there was no evidence on which the County Court Judge could arrive at that conclusion, or that the evidence was such as to preclude the possibility of there having been a separate undertaking by Moore so far as the joinery work was concerned. He had felt some doubt on this last point, as Malthouse & Ward, the building owners, who did the brickwork themselves, said that they put up the scaffolding, not only for the purpose of doing the brickwork, but also to be used by the joiners in doing the joinery. That was material for consideration when the question was asked whether Malthouse & Ward were undertakers as to the whole of the building. If they were undertakers as to the whole, then Moore could not have been an undertaker, but must have been a sub-contractor. But he was not prepared to say that the mere fact that when Malthouse & Ward erected the scaffolding they intended that it should be used for the purpose of the joining work enabled him to say as a matter of law that that made Malthouse & Ward undertakers of the whole work of building these houses. He, therefore, agreed that the appeal should be dismissed.

LORD JUSTICE ROMER concurred.

Also reported in *The Times*, June 18, 1900.

Consult *Mason* v. *Dean* (*ante*, p. 91); *Percival* v. *Garner* (*post*)

## PERCIVAL *v.* GARNER.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 396.

*Undertakers—Building.*—SEC. 7.

A man who undertakes to supply the labour for the brickwork of a building which is being constructed, does not undertake a separate and substantial part of the construction so as to bring him within the Act.

THIS was an appeal from the decision of the Liverpool County Court Judge under the Workmen's Compensation Act, 1897. The applicant for compensation was the widow of a workman, William Percival, who was killed by an accident arising out of and in the course of his employment. It appeared that a building was being erected on the premises of Messrs. Bowman & Co., chemical manufacturers. The building was over 30 feet in height, and was being constructed by means of a scaffolding. The building was being erected under the supervision of Messrs. Bowman & Co., who supplied the materials for it, and who employed the architect. The appellant, John Garner, at the request of Messrs. Bowman & Co., supplied the labourers for the brickwork of the building. The men so supplied acted under the orders of Messrs. Bowman & Co.'s foreman, and the appellant had nothing to do with the work, nor was he responsible for the way in which the work was done, nor had he any control over the men when at work. The appellant paid the men he supplied for the work, and Messrs. Bowman & Co. remunerated him by a payment—an extra halfpenny an hour upon the men's time. William Percival was one of the labourers supplied for the work by the appellant, and while at work on the building he fell off a scaffolding and was killed. It was contended on behalf of the appellant that he was not an "undertaker" within sec. 7 of the Workmen's

Compensation Act, 1897, and was not, therefore, liable to pay compensation. The County Court Judge held that the appellant was the person undertaking the construction of the building, and was therefore an undertaker. He accordingly made an award in favour of the widow. Garner appealed. By sec. 7, sub-sec. 1, of the Act, "This Act shall apply only . . . to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . ." By sub-sec. 2, "'Undertakers' in the case of a building means the persons undertaking the construction, repair, or demolition."

Mr. *A. P. Thomas* appeared for the appellant; Mr. *M. V. D'Arcy* appeared for the respondent.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the person against whom proceedings must be taken to recover compensation was the person undertaking the construction of the building. It was clear that in the present case Messrs. Bowman & Co. were the persons undertaking the construction of the building. They were erecting the building on their own land, they employed their own architect, the building was being erected under their supervision, and the men were, while at work, under the control of their foreman. The appellant merely undertook to supply the labour. That did not make the appellant an "undertaker" within the meaning of the Act. In truth, the proceedings were taken against the wrong person. The decision of the County Court Judge must therefore be reversed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

Solicitors: *J. H. Glover, Liverpool, for the appellant; Metcalfe, Birkett, & Rowlatt, for Spensley, Liverpool, for the respondent.*

Also reported in (1900) 2 Q. B. 407; 64 J. P. 500; 16 T. L. R. 396.
Consult *Mason* v. *Dean* (*ante*, p. 91); *Stead* v. *Moore* (*ante*, p. 96).

## LYSONS *v.* KNOWLES & SONS (LIMITED).

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 251.

*Workman—Average weekly Earnings.*—SEC. 7, 2.—SCHED. I. 1 (*b*).

A workman in order to come within the Act must have been in the employment not less than two weeks.

THIS was an appeal by the employers from an award of the Judge of the County Court of Lancashire, holden at Salford, in an arbitration under the Workmen's Compensation Act, 1897. The employers were the owners of a colliery near Manchester. The applicant, who was a pitman, went into their employment as a piece worker at wages of 6*s.* a day on Tuesday, July 18, 1899. He went into the pit and did a day's work. On the next day, Wednesday, there was a holiday at the pit, and the applicant did not go to work. On Thursday he went to do another day's work, and while he was at work he was injured by the fall of a piece of coal. On Friday, July 21, he was paid 6*s.* for the work which he did on the Tuesday, and on Friday, July 28, he was paid 6*s.* for the work which he did on the Thursday. The colliery week ended on Tuesday evening. The question was, what was the right way of calculating the applicant's "average weekly earnings" under para. 1 (*b*) of the first schedule to the Workmen's Compensation Act. The County Court Judge thought that, as the applicant had earned 12*s.* within seven days, his average weekly earnings were that sum, and he made an award for a weekly payment of half that sum—viz. 6*s.* By para. 1 of the schedule "the amount of compensation under this Act shall be (*b*) where total or partial incapacity for work results from the injury a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during

the previous twelve months, if he had been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1."

Mr. *F. H. Mellor* appeared for the employers in support of the appeal, and argued that the applicant did not come within the Act, on the ground that the Act did not afford any machinery by which compensation could be awarded to him. It was impossible to ascertain the average weekly earnings of a man who had only worked for two days.

Mr. *Joseph Walton*, Q.C., and Mr. *Postlethwaite*, for the applicant, argued that the Act was not confined to men who were engaged by the week. The words were a "payment not exceeding 50 per cent. of his average weekly earnings." Sec. 1 of the Act gave the right to compensation, and these words in the schedule merely fixed a limit. The word "average" only applied where there was anything to average; if there was not, then the *maximum* sum, which was not to be exceeded, was the sum which the man had actually earned.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said this appeal raised a question of great importance, which was simply this—whether a workman came within purview of the Workmen's Compensation Act, who having entered into an employment and gone to work, was injured on the first day of his employment. In this case the workman had worked for two days, but the question was the same whether the man worked on two days or only on one day. The facts were that the applicant went into his master's employment on Tuesday, July 18, 1899, and did a day's work. On Wednesday the pit was not at work, and the applicant did not go there at all. On Thursday he went into the pit to do a day's work, and while he was at work on that day he was injured. Was he within the Act? It was asked on behalf of the applicant, Why should he not be within the Act? His Lordship could not answer that question; his duty was to consider whether, on the true construction of the

words used by the Legislature, the applicant was within the Act. They had already held that upon the words of the statute a painter painting the outside of a house on a ladder was not within the Act, though a builder under the same circumstances would be within it; though why the one was included and the other excluded he could not say. The words which they now had to consider were very important words—viz. the words in sched. I. which regulated the payment of compensation. His Lordship read para. 1, and said the question was whether they embraced the case of a man who had only been at work a day, or whether they contemplated that the man should have been at work for such a time that his weekly earnings might be averaged. Mr. Walton's argument cut the word "average" out of the schedule. In his opinion the Court was driven to say that, in order to come within the Act, a man must have been at the time of the accident in his employment for at least two weeks. If he had not been in employment for two weeks, it was impossible to give any meaning to the words "average weekly earnings."

LORD JUSTICE COLLINS was of the same opinion. It seemed to him to be impossible to give any decision on this Act which should be logical and free from anomalies. The Legislature had not brought every workman within the Act, and they could not speculate on the reasons why certain classes had been left out. He thought that the schedule, reading in its natural sense, contemplated that the relation of master and servant should have existed for not less than two weeks.

LORD JUSTICE ROMER said he felt great doubt as to this case, but he did not differ from his learned brethren.

Solicitors: *Rowcliffes, Rawle, & Co., agents for Fullagar & Hulton, Bolton, for the employers; Radford & Frankland, agents for Bowden & Widdowson, Manchester, for the applicant.*

Also reported in (1900) 1 Q. B. 780; 69 L. J. Q. B. 449; 82 L. T. 189; 48 W. R. 408; 64 J. P. 292; 16 T. L. R. 251.

Consult *Stuart* v. *Nixon* (*post*, p. 104).

## STUART *v.* NIXON & BRUCE.

Before COLLINS, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 335.

*Workman—Dependants—Employment of deceased Workman—Length of —Average weekly Earnings.*—SEC. 7, 2.—SCHED. I. 1.

The dependants of a deceased workman are not entitled to compensation unless the deceased, at the time of the accident, had been in the employment for at least two weeks.

THIS was an appeal from an award of the Liverpool County Court Judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The appellant was the widow of a deceased workman who at the time of the accident causing his death was a stevedore's labourer in the employment of the respondents. The following are the admitted facts:—The deceased man was a casual labourer, and had been employed by the respondents for five days continuously at daily wages. On the fifth day he was killed by an accident. The respondents were engaged as stevedores in loading a ship in the docks at Liverpool from the wharf by means of a winch worked by steam power, a derrick, and a fall, and they were in the occupation of the machinery. The deceased was on the day of the accident, in the course of his employment, finishing off a hold on board the ship, the hold having just been filled with cargo. The finishing off consisted in putting two iron cross beams across the hatchway. The beams had to be slung into position by means of the winch, derrick, and fall, which were all on board the ship. The deceased with three other men had put the port piece into position. The fore and aft piece was then slung, the fall was round it, and it was slung by the winch over the hatchway. The two pieces were made to fit by two

cleats. The fall got entangled, and the deceased went to disentangle it, when the fore and aft beam canted and jerked him down into the hold. He died a few days afterwards from the effects of the accident. The County Court Judge held, (1) that the Act of 1897, by reason of sched. I., para. 1 (*a*) (i.), did not apply, as the deceased man had only been employed for five days by the respondents; (2) that the machinery was not, at the time of the accident, used in the process of loading the ship, as the cargo had been put on board, and the accident happened when the hatches were being put on to preserve the cargo from injury, and that therefore the machinery was not a "factory" within the meaning of sec. 7 of the Act. He accordingly made an award in favour of the respondents. Since the decision of the County Court Judge the Court of Appeal decided, in the case *Lysons* v. *Andrew Knowles & Sons* (*Limited*) (*ante*, p. 101), that a workman who had been employed for less than two weeks and was injured did not come within the Act, sched. I., para. 1 (*b*), not being applicable to such a case. By sched. I., para. 1, "The amount of compensation under this Act shall be, (*a*) where death results from the injury, (i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case the sum of £300, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

Mr. *Leslie Scott* (Mr. *Joseph Walton*, Q.C., with him), for the appellant, said that the first part of para. 1 (*a*) (i.) of sched. I. gave compensation equal to the workman's earnings

in the employment of the same employer during the three years next preceding the injury, the *maximum* sum not to exceed £300 and the *minimum* sum to be £150. That was the important part of the clause. The rest of the clause merely provided a mode of calculating the workman's weekly earnings where a calculation was necessary. The right to compensation was given by sec. 1 of the Act, the schedule merely stating what should be the amount of compensation. In the present case no calculation was necessary, as the appellant was entitled to the *minimum* compensation of £150. The decision in *Lysons* v. *Andrew Knowles & Sons* (*ante*) turned upon para. 1 (*b*) of sched. I., where the language was different. The County Court Judge was, therefore, wrong upon this point. The Court intimated that they were against the appellant upon the first point, and that, therefore, it was not necessary to argue the second question.

Mr. *Ruegg*, Q.C., and Mr. *A. G. Steel*, for the respondents, were not called upon.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, the appeal must be dismissed. The question was whether the case of a labourer who was employed only for one day, taking an extreme case, and who met with his death by an accident arising out of and in the course of his employment on that day, came within the Act. It was contended that the decision in *Lysons* v. *Andrew Knowles & Sons* did not govern the present case. In that case the workman, who was injured, but not killed by an accident, had, at the time of the accident, been employed by the same employer for a period less than two weeks. It was said that the observations of the Court in that case upon para. 1 (*a*) (i.) were merely *obiter dicta*, and did not decide the present case, and that the appellant was entitled to compensation to an amount not less than £150. He (the Lord Justice), and he thought he could also speak for Lord Justice A. L. Smith, arrived at the conclusion, taking all the sections and provisions of the Act

together, that the Legislature could not have intended to introduce labourers of this class into the Act. He was not pressed with the difficulties of this view suggested in the argument. He could not follow the difficulties. He did not think that para. 1 of sched. I. created any real difficulty of construction at all. Its meaning was reasonably simple. The first part of para. 1, which dealt with the death of a workman, contemplated in the first place that the workman should have been in the employment of the same employer during the three years next preceding the injury causing his death. If his earnings during those three years amounted to or exceeded £300, the workman's dependants would get that sum. If his earnings did not amount to £300, then they would get the amount of his earnings, the *minimum* sum being fixed at £150. So far the paragraph related to employment by the same employer during the three years next preceding the injury. The next part of the paragraph dealt with a case where the employment was for less than three years. The Act said that in such a case "the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer." The compensation was based upon the average weekly earnings during the period short of three years. That was subject to this, that the employment must have lasted for at least two weeks. He did not say that it was absolutely necessary that the workman must have been employed every day during those two weeks, but the employment must be such as to form the basis for the calculation of average weekly earnings. That was the reasoning adopted by this Court in *Lysons* v. *Andrew Knowles & Sons.* It would be most anomalous to hold that a casual workman who was injured by an accident not resulting in death would not be entitled to any compensation, whereas, if the workman died from the effects of the accident, his dependants would be entitled to compensation. If that were the true view of the statute, a workman who after an accident lingered for some time between life and death

would during that time be in a position in which he would not know whether compensation would eventually be payable or not. In his opinion, the case was covered by the decision in *Lysons* v. *Andrew Knowles & Sons.*

LORD JUSTICE VAUGHAN WILLIAMS concurred. They ought to construe the Act upon the basis that workmen who were not in the employment of the same employer for at least two weeks did not come within the purview of the Act.

LORD JUSTICE ROMER agreed that the case was governed by the reasoning upon which *Lysons* v. *Andrew Knowles & Sons* was decided.

Solicitors: *Crowders, Vizard, & Oldham, for G. J. Lynskey, Liverpool, for the appellant; W Hurd & Son, for Oliver Jones, Billson, & Co., Liverpool, for the respondents.*

Also reported in (1900) 2 Q. B. 95; 69 L. J. Q. B. 598; 82 L. T. 489; 48 W. R. 598; 16 T. L. R. 335.

Consult *Lysons* v. *Knowles* (*ante*, p. 101).

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House of Lords.

## THE MAIN COLLIERY COMPANY (LIMITED) *v.* DAVIES.

Before LORD HALSBURY, L.C., LORDS MORRIS, SHAND DAVEY, BRAMPTON, and ROBERTSON.

16 *T. L. R.* 460.

*Dependent—Meaning of.*—SEC. 7, 2.

The deceased was a lad of sixteen, earning 8*s.* a week, which he gave to his parents, they providing him with food, clothes, etc. His father was a collier, earning 25*s.* a week, and there were five other children, two of whom contributed their earnings, the one 12*s.* and the other 7*s.* 6*d.* a week, to swell the common fund.

*Held* that there was evidence that the parents were "dependent" upon the earnings of the deceased.

The only thing that can properly be regarded is what the family was in

fact earning, what the family was in fact spending, for the purpose of its maintenance as a family (per Earl of Halsbury, L. C.).

It is much more satisfactory to look at the actual income and expenditure rather than to introduce some vague and uncertain standard which it is impossible to lay down with precision (per Lord Davey).

"It would be hopeless to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact by the arbitrator." ("Accidents to Workmen." Adopted by Henn Collins and Romer, L.JJ., in *Simmons* v. *White* (1899) 1 W. C. C. 89. Approved by Lord Shand.)

THIS was an appeal under the Workmen's Compensation Act, 1897, and the question was as to the meaning and effect of the word "dependent" in sec. 7, 2. The Court of Appeal *—Lords Justices A. L. Smith, Rigby, and Vaughan Williams—on June 5, 1899, affirmed the judgment and confirmed the award of Judge Bishop, of the Glamorganshire County Court, dated March 23, 1899. The application was by William and Catherine Davies, the father and mother of William Rees Davies, who was killed by an accident arising out of and in the course of his employment by the appellant company, for compensation under the Act. The father was an able-bodied collier, earning the usual wages in the locality, and the boy was a hauler in the appellants' employ, earning 2*s.* 6*d.* a day. By reason, however, of strikes, stoppages, and other causes, his actual wages averaged 8*s.* a week only for the preceding 115 weeks worked. The boy lived at home with his parents and gave them all his wages, but they found him in food, lodgings, clothes, etc., and gave him an occasional sixpence for pocket money. The respondent had five other children, two of whom earned weekly wages, which were given to their mother. The County Court Judge found

* Reported (1899) 1 W. C. C. 92, which see.

that the parents were in part dependent on the son's earnings, and after taking into consideration the amount necessary for the boy's keep and clothing awarded £23 8*s*.

Mr. *Ruegg*, Q.C., Mr. *C. A. Russell*, Q.C., and Mr. *St. John Francis-Williams* were counsel for the appellants.

*Sir Robert Reid*, Q.C., Mr. *Brynmor Jones*, Q.C., and Mr. *S. T. Evans*, for the respondent, were not heard.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said that a short question of fact had been determined by the County Court Judge, who had found that there was a dependency in this case. The extent to which such dependency existed was not a matter for their Lordships to consider. The learned County Court Judge might have been right or wrong as to the exact degree to which that state of things existed; but if it existed at all the appeal must be dismissed. His Lordship did not think the Legislature had ever intended that any sharp, defined line should be drawn. In each case the question must be judged on the facts. What was the meaning of "dependent"? The notion that because a person who was under a legal obligation to keep the whole family, and who earned a considerable part of the total income himself, whilst, it might be, the others contributed only a small part, appeared to be the reason why the Legislature had introduced not only the word "dependent," but also "in part dependent." He had no doubt whatever that there was dependency in this case. The whole family relied on the wages earned. Whose wages? Clearly in part those of the boy. It appeared to have been forgotten that the obligation was upon the head of the family, who would be punished if he did not maintain his wife and children. The family being thus dependent upon the father, he in turn partly depended on the wages earned by those for whose maintenance he was responsible, and who made a contribution to the general fund. If it was true that the boy earned 8*s*. a week, it was clear that the father was dependent to some extent upon the boy's earnings in order to discharge his legal obligations. He was unable to see that there was

anything in this case beyond the mere question of fact. He declined to assume that the Legislature had created a standard in the matter. No broad principle could be laid down, and no human intellect could define what the standard should be applicable to all cases. The problem was extremely obscure. The only things which the County Court Judge could regard were, what the family were in fact earning, and what they were in fact spending, for the purpose of maintenance. The learned Judge had taken those matters into consideration, and properly answered those questions. Lord Justice Rigby had said that he would have come to the same conclusion as the County Court Judge, and his Lordship quite concurred in that opinion.

LORD MORRIS entirely concurred in the motion for the reason assigned by his noble and learned friend on the woolsack.

LORD SHAND said that in this case he had no difficulty in concurring with the motion of the Lord Chancellor. The facts showed that the father was in part dependent on the son's wages for his maintenance. He also agreed in thinking that, although the members of the household might not be dependents within the meaning of Lord Campbell's Act, still the fact of the father's having a large family was a circumstance which the County Court Judge was entitled to take into account. But, with deference to the Lord Chancellor, he was unable to accept the view that cases might not arise in which it would be necessary to adopt some standard for the decision of the question whether the father was or was not dependent on his son's wages. On that question he did not think that the mere circumstance that the father spent the money he received was conclusive of dependency. A father who was very well off and yet spent the money received as a child's wages could not be described as dependent. He agreed in the view expressed in the passage cited from Messrs. Minton-Senhouse and Emery's treatise "Accidents to Workmen," by Lords Justices Collins and Romer in *Simmons* v. *White* (1899) 1 W. C. C. 89. It was there stated,

page 156—"Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life." That was the test to be applied.

LORD DAVEY also concurred, and observed that it was more satisfactory to look at the actual expenditure of the family than to introduce some vague canon which it would be impossible to express with precision.

LORD BRAMPTON and LORD ROBERTSON also concurred.

Also reported in (1900) A. C. 358; 69 L. J. Q. B. 755; 80 L. T. 674; 16 T. L. R. 460.

Reported in the Court of Appeal (1899) 1 W. C. C. 92.

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## SPENCER *v.* LIVETT, FRANK, & SON, AND JOHN AIRD & COMPANY.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 179.

*Shipbuilding Yard.*—SEC. 7, 3.—*Factory and Workshop Act*, 1878, *sec.* 93.

A shipbuilding yard is a place where the business of making, repairing, or finishing ships is carried on. The fact that some repairs are being done to a ship at a certain place does not constitute that place a "shipbuilding yard."

THIS was an appeal from the award of the Southampton County Court Judge under the Workmen's Compensation Act, 1897. The appellants, Messrs. Livett, Frank, & Son, were a firm of ships' chandlers who supplied stores to ships, and in addition they undertook the painting of ships. The applicant, Spencer, was a workman in their employment. The owners of the steamship *Jelunga*, which was at Southampton, employed Messrs. Livett, Frank, & Son to paint the inside of the ship, and for this purpose the ship was taken into the inner dock and moored alongside a quay. In order to paint her it was necessary to remove the ballast, and as Messrs.

Livett, Frank, & Son did not do this class of work, Messrs. John Aird & Company undertook to do it. Messrs. Livett, Frank, & Son lent some men, including the applicant, to Messrs. John Aird & Co., who paid the men so lent to them. The ballast was taken out of the ship's hold by means of a steam crane on the ship worked by the ship's crew, the crane hoisting a bucket and lowering it down into barges, in the dock. The applicant was at the time of the accident working in the hold of the ship taking out the ballast, when the bucket which was being raised by the crane struck him and injured him. The applicant claimed compensation. Messrs. Livett, Frank, & Son, and Messrs. John Aird & Co., were made respondents upon the claim, and Messrs. Livett, Frank, & Son also claimed indemnity against Messrs. John Aird & Co. in case they were held liable to the applicant. The inner dock, where the ship was, was practically surrounded by warehouses, and cranes were placed at intervals along the dock quays for loading and unloading ships. The *Jelunga* was at the same time having some internal repairs done tc her while in the dock by a firm called Day, Summers, & Co., and one of the witnesses said that it was a customary thing for Day, Summers, & Co. to do repairs to ships in this and any other dock. The County Court Judge found that at the time of the accident the applicant was solely in the employment of Messrs. Livett, Frank, & Son; that he was employed in and about the crane and machinery which were being used to discharge the ballast; that the dock in which the *Jelunga* was, including the quay and all that part of the dock filled with water, was a factory within the meaning of sec. 7 of the Workmen's Compensation Act, 1897; that the ship's engine and crane used to discharge the ballast was a factory within the meaning of the Act; that it was the usual and ordinary course of business that ships should be repaired in the dock in question both as to the ship itself and as to her machinery; that the *Jelunga* was on this occasion in the dock for the purpose of repair and was actually in course of being repaired at the time of the accident; and that the

ship's engine and crane were being used in the performance of work necessary to be performed for repairing the ship and painting the ship as described in the evidence. The learned Judge held that the dock was a "factory" within the meaning of sec. 7, sub-sec. 2, of the Act of 1897, as the process of unloading the ballast into a barge came within sec. 23, sub-sec. 1, of the Factory and Workshop Act, 1895, it being unloading on to a dock; and he also held that by sec. 93 of the Factory and Workshop Act, 1878, and sched. IV. part 2, the dock was a "factory." He accordingly awarded £40 to the applicant, and held that Messrs. Livett, Frank, & Son were not entitled to be indemnified by Messrs. John Aird & Co. Messrs. Livett, Frank, & Son appealed.

Mr. *R. M. Bray*, Q.C., and Mr. *S. H. Emanuel*, for the appellants, contended that the Judge was wrong in holding that the dock was a "factory" within sec. 7 of the Act 1897, which incorporated sec. 23 of the Factory and Workshop Act, 1895. The decision in *Hennessey* v. *McCabe* (p. 80) was not given when the County Court Judge gave his decision. That case was conclusive upon the point. They also referred upon this point to *Flowers* v. *Chambers* ([1899] 1 W. C. C. 51). Nor was the dock a factory within sec. 93 of the Factory and Workshop Act, 1878, which defined a non-textile factory as meaning any premises or places named in part 2 of sched. IV. to the Act, wherein steam, water, or other mechanical power was used in aid of the manufacturing process carried on there. Amongst the premises referred to in part 2 of sched. IV. was "shipbuilding yards—that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." The dock here was an ordinary loading and unloading dock, not a repairing yard.

Mr. *Clavell Salter*, for the applicant, said that he was precluded by the decision in *Hennessey* v. *McCabe* from arguing that the dock was a factory within sec. 23 of the Factory and Workshop Act, 1895. But it was a factory within sec. 93 of the Factory and Workshop Act, 1878, and part 2 of sched. IV.

to the Act. The Judge had found that this dock was a place where ships were repaired. The dock therefore came within the definition of "shipbuilding yard," and as such was the factory within the Act, and therefore a factory within sec. 7 of the Workmen's Compensation Act, 1897. He also referred to sec. 7, sub-sec. 3, of the Act of 1897.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the present case was decided by the County Court Judge before the decision of this Court in *Hennessey* v. *McCabe.* In that case the applicant, who was injured, was on board a ship lying in a dock, and was engaged in loading the ship with cargo from a lighter by means of a steam winch attached to the ship. This Court held that the case did not come within the Act. That decision, therefore, covered the present case so far as regarded sec. 23, sub-sec. 2, of the Factory and Workshop Act of 1895. It was then said that the definition of a non-textile factory in sec. 93 of the Factory and Workshop Act, 1878, applied to this dock. His Lordship could not see any manufacturing process carried on in this dock. That definition, however, referred to sched. IV., part 2 of the Act. That schedule included a "shipbuilding yard" as one of the places included in sec. 93. Shipbuilding yard was defined as meaning "any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." Could it be said that this inner dock was a shipbuilding yard where ships were made, finished, or repaired? As Lord Justice Romer had suggested during the argument, if it were so, then one ship going into a dock for some repairs where there were 20 or 30 other ships loading or unloading would make the dock a "shipbuilding yard," and therefore a factory. That point also was untenable. The Act 1897 therefore did not apply.

LORD JUSTICE COLLINS concurred. He only wished to add that sec. 7, sub-sec. 3, of the Act of 1897 was itself enough to show, if it were required, that the contention of the applicant was not tenable.

LORD JUSTICE ROMER concurred. With regard to the

definition of "shipbuilding yard," in his opinion the Legislature contemplated premises where the business of making, finishing, and repairing ships was carried on.

Solicitors: *Speechly, Mumford, & Co., for C. Lamport, Southampton, for the appellants; French & Co., for E. R. Ensor, Southampton, for the applicant; J. Robinson & Co., for John Aird & Co.*

Also reported in (1900) 1 Q. B. 498; 69 L. J. Q. B. 338; 82 L. T. 75; 48 W. R. 323; 64 J. P. 196; 16 T. L. R. 179.

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## ELLIS *v.* KNOTT.

Before COLLINS, VAUGHAN WILLIAMS, and ROMER, L.JJ.

*The Times, April* 9, 1900.

*Amount of Compensation—Discretion of Arbitrator.*—SCHED. I. 1.

The amount of compensation is in the discretion of the arbitrator subject to the express limitations in sched. I. 1, and to the provisions of sched. I. 2.

Where a man earns something but not enough when added to the compensation payable to equal what he was earning before the injury, an arbitrator is not bound to reduce the payments so that the actual loss to the workman shall be borne equally by him and his employer.

THIS was an appeal from the award of Judge Smyly, Q.C., sitting at the Derby County Court, on an application by the appellant to review a weekly payment under the Workmen's Compensation Act, 1897. The appellant, William Robert Ellis, was a joiner, and the respondent, George Richard Knott, was employed by him as a machinist. Part of the respondent's duty was to work at a circular saw. While so working on August 21, 1899, he met with an accident, one of his fingers being cut off by the saw and two other fingers injured. The average weekly earnings of the respondent were 36*s*. An agreement was arrived at, by which the appellant agreed to

pay the respondent 18*s.* a week. A memorandum of this agreement was registered in the County Court under sched. II., para. 8, to the Act of 1897, the memorandum stating that the appellant was to pay to the respondent a weekly payment of 18*s.* as compensation, such payment to continue during the incapacity of the respondent, or until such time as the same should have been ended, diminished, or increased according to the provisions of the Act. In November, 1899, the appellant offered to take the respondent back into his employment at the same wages as before, but the respondent refused the offer. The appellant thereupon filed a request for arbitration to review the weekly payment under sched. I., para. 12, to the Act. The respondent at this time was earning about 10*s.* a week at boot repairing and selling newspapers. At the hearing medical evidence was given as to whether the respondent was fit to work at the same employment as before the accident, and the evidence of the appellant was to the effect that the offer which he made was to employ the respondent at the same work at which he was working before the accident and at the same wages. The County Court Judge said that, in his opinion, the respondent could not work at the same employment at which he worked before the accident, or earn at that employment the wages he then earned; and that, in his opinion, he ought not to compel a man to go back to the employment to which he objected to go, even though the employer offered to make things easy and pay him his full wages. He further said that the sums which the respondent now earned were, in his opinion, no justification for reducing his allowance. He accordingly made an award refusing to reduce the weekly allowance.

Mr. *W. S. Shaw* appeared for the appellant; Mr. *C. C. Scott* appeared for the respondent.

The COURT dismissed the appeal.

LORD JUSTICE COLLINS said that, in his opinion, the appeal failed. The County Court Judge's judgment, coming immediately after the evidence was given, was capable of no reasonable doubt. The finding of the Judge was that the

man was no longer capable of earning the same wages at the same work at which he was employed before the accident. That work was, upon the evidence, the only work at which he could as a mechanic earn wages of that amount. Having lost one of his fingers and two other fingers being injured, the man was not fit to work at the circular saw. That was the only work offered to him by the appellant. The finding of the Judge was, therefore, a finding that the man's earning capacity had been diminished. Having arrived at that fact, everything else followed, and the amount of the weekly payment was for the Judge to determine after giving due effect to all proper considerations. The Judge had considered the amount which the respondent had been able to earn since the accident.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Also reported in *The Times*, April 9, 1900.

Consult *Russell* v. *Holme* (*post*, p. 153); *Illingworth* v. *Walmsley* (*post*).

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## ILLINGWORTH *v.* WALMSLEY.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 281.

*Amount of Compensation.*—SCHED. I. 1, 2.

The *maximum* amount of compensation allowed by sched. I., para. 1 (*b*), is not cut down by para. 2.

THIS was an appeal from the award of Judge Coventry, sitting at the Blackpool County Court, under the Workmen's Compensation Act, 1897. On December 20, 1898, the respondent was injured while in the employment of the appellant, three of his fingers being severely damaged by a

circular saw at which he was working. His weekly wages before the accident were £1 13*s.* 8*d.* On December 22 the respondent sent to the appellant notice of the accident, and the appellant paid the respondent 16*s.* 10*d.* a week, being 50 per cent. of his weekly wages, from that time until May 27, 1899. The respondent then resumed work at the weekly wages of 15*s.*, and continued at work at those wages until September 19, 1899, when he filed a request for arbitration to assess compensation under the Act for the injury sustained on December 20, 1898. The County Court Judge, on October 25, 1899, awarded the respondent a lump sum of £9 13*s.* 6*d.* and 15*s.* a week from October 25, 1899.

Mr. *J. D. Crawford*, for the appellant, contended that "the claim for compensation" was not made within the six months required by sec. 2, sub-sec. 1, of the Act.

Mr. *F. H. Mellor*, for the respondent, contended that the point was not open to the appellant, because it was not taken in the answer to the particulars annexed to the request for arbitration, as required by Rule 17 (1) of the Workmen's Compensation Rules, 1898, and the County Court Judge refused to allow the appellant to amend his answer.

The COURT said that, that being so, the point could not be raised now.

Mr. *Crawford* said that there was another point raised by the appeal. The respondent's weekly wages before the accident were £1 13*s.* 8*d.* He received half those weekly wages until May 27, 1899, when he resumed work at 15*s.* a week wages. The difference between his old wages and the wages he earned after May 27 was 18*s.* 8*d.* a week. Therefore his loss was that sum, and the County Court Judge could only award him 50 per cent. of that sum under sched. I., para. 1 (*b*), and para. 2, to the Act. By para. 1 (*b*) the amount of compensation in the case of total or partial incapacity for work was not to exceed 50 per cent. of the workman's previous average weekly earnings; and by para. 2, in fixing the amount of the weekly payment, "regard shall be had to the difference between the amount of the average

weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." Taking those two clauses together, the true meaning was that the workman could only receive one-half of the loss sustained by him—namely, one-half of 18*s.* 8*d.* a week; that was 9*s.* 4*d.* This was the highest weekly sum that the County Court Judge could give.

Mr. *F. H. Mellor*, for the respondent, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the *maximum* amount of compensation allowed by para. 1 (*b*) of sched. I. was not cut down by para. 2.

LORD JUSTICE COLLINS agreed. There was the express provision in para. 1 (*b*) of sched. I., and when para. 2 was looked at different language was used, that clause saying "regard shall be had," etc. How regard was to be had, or what the effect was, it was not so easy to see. In his opinion para. 2 did not intend to interfere with the *maximum* amount of compensation allowed by para. 1 (*b*).

LORD JUSTICE ROMER concurred. All that para. 2 meant was that the County Court Judge must bear in mind and have regard to the average weekly wages earned by the workman before the accident. But, while bearing that in mind, there was a limit placed upon the amount of compensation payable, and the only absolute limit imposed was that in para. 1 (*b*)—namely, half the amount of the average weekly wages earned before the accident. There was no point in the case at all. There was no evidence that the County Court Judge did not have regard to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he was able to earn after the accident.

Solicitors: *Mellor, Day, & Smith, for the appellant; Busk & Co., for Callis & Co., Blackpool, for the respondent.*

Also reported in (1900) 2 Q. B. 142; 69 L. J. Q. B. 519; 82 L. T. 647; 16 T. L. R. 281.

Consult *Ellis* v. *Knott* (*ante*, p. 116), *Russell* v. *Holme* (*post*, p. 153).

## SMITH *v.* CORD TATON COLLIERY COMPANY (LIMITED).

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

*The Times, February* 6, 1900.

*Incapacity—Result of Injury or Neglect of Advice.*—SCHED. I. 1.

Whether present incapacity for work results from the injury or from neglect of medical or surgical advice, is a question of fact.

THIS was an appeal from the award of the Flintshire County Court Judge. The applicant was a collier in the employment of the Cord Taton Colliery Company, and met with an accident arising out of and in the course of his employment, the result being a severe fracture of the shoulder. The only question was as to the amount of compensation payable. The accident happened on October 25, 1898, and the fractured shoulder was put by the surgeon into splints, in which it remained until December, 1898. On their removal the applicant was told by the surgeon to move his arm as much as he could, and directions were given to him as to the manner of doing so. On December 28 and February 11, the applicant was examined by different surgeons, and again directions were given to him as to how he should move his arm. In June, 1899, at the time of the arbitration, the joint was reported to be stiff, and the applicant was, therefore, in a condition which disabled him from earning full wages. At the time of the accident the applicant was earning 19*s.* a week, and the colliery company paid him 9*s.* 6*d.* per week until March 27, 1899, when the payment was stopped, as in the opinion of the surgeons his incapacity after that date was solely due to his neglect to follow the directions given him. The County Court Judge found that the applicant did not carry out the instructions of

the surgeons, and that if he had followed them there was every reason to believe that he would have been fit for work on March 27, 1899; that the applicant was a man of very nervous temperament, and that this constitutional and natural nervousness, intensified to some extent by the accident, was the reason why the applicant did not carry out the directions of the medical men, and that this neglect had delayed his recovery, and was the cause of his present inability to work; that his neglect to obey the instructions was not the result of wilfulness or carelessness, but was due to the nervous condition which he appeared to have been unable to control. In these circumstances, he made an award in favour of the applicant for 9*s.* 6*d.* a week from March 27, 1899. The colliery company appealed.

Mr. *Cripps*, Q.C. (Mr. *Horridge* with him), for the appellants, contended that the County Court Judge was wrong. [LORD JUSTICE A. L. SMITH: Where is there any question of law?] It was a question of law whether the appellants were bound to pay the applicant a weekly sum for an incapacity to work caused, not by the accident, but by his own neglect to follow the doctors' instructions. [LORD JUSTICE ROMER: The pain caused probably by following the doctors' instructions to exercise the arm might have an effect upon a nervous man, and prevent him from continuing to follow the instructions.] This was not a case of some physical weakness of the workman aggravating the injury, but a neglect to follow the doctors' directions, for which neglect the workman could not charge his employers.

Mr. *E. H. Lloyd*, for the applicant, was not called upon.

The COURT dismissed the appeal.

Also reported in *The Times*, February 6, 1900.

## HEWLETT *v.* HEPBURN.

Before A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 56.

*Average weekly Earnings—Break in Employment.*—SCHED. I. 1.

Where there has been a break in the employment, the average weekly earnings must be calculated from the commencement of the new employment. If a man is away from work for 11 weeks and returns without any fresh engagement, having left his tools on the job, there is evidence of a break in the employment.

*Quære*, must there be a continuity of contractual engagement?

THIS was an appeal from an award of the Dartford County Court Judge under the Workmen's Compensation Act, 1897. The only question raised was as to the amount of compensation payable. The respondent was a carpenter, who was in the employment of the appellants. On August 24, 1897, the respondent was first employed by the appellants, and he remained at work for them until February 17, 1898, being paid by the hour. His wages varied during that period. There was no agreement as to what notice was necessary to terminate the employment, but it was admitted that some notice was usually necessary. From February 17 to May 12, 1898, he was absent through illness, and on the latter date he came back to work, and remained at work until August 18, when he was again absent, from ill-health, until September 3, 1898. He then came back and remained at work until February 6, 1899, when he met with the accident in question, which caused the loss of two of his fingers and the partial loss of a third. The question was whether the employment was continuous, notwithstanding the respondent's absence through illness, in which case the compensation payable would be 12*s.* 9*d.* a week, or whether the employment was determined when

the respondent was absent through illness, in which case the period of employment to be considered in assessing compensation would be from September 3, 1898, to February 6, 1899, when the weekly compensation would be 17s. 9d. No notice to terminate the employment was given, and the respondent, when he went back to work after each illness, did not go in to re-engage himself. He left his tools when he was absent at the appellants' works. He did not receive any wages when absent, and it was stated in evidence to be the regular practice, when a man recovered from illness, for him to go back to work without any application unless notice to the contrary was given. It also appeared that the foreman on several occasions during the absence of the respondent through illness asked the respondent's brother when he was coming back to work. The County Court Judge found that the employment was by the hour, and in law came to an end on August 18, 1898. He accordingly assessed the compensation at 17s. 9d. a week.

Mr. *G. F. Hohler*, for the appellants, contended that there was no evidence upon which the Judge could have found that the employment came to an end on August 18, 1898. It was common ground that notice was necessary to determine the employment, and none was given here. The evidence showed that the employment was not determined by absence caused by illness, though the payment of wages ceased. The respondent left his tools at the works and came back to work without being re-engaged. Moreover, the Judge did not find that the employment had terminated in fact, but he said that in law it had terminated. There was no rule of law that illness terminated an employment. He referred to *Jones* v. *Ocean Coal Company* ([1899] 1 W. C. C. 94) and *Appleby* v. *Horseley Company* ([1899] 1 W. C. C. 103).

Mr. *A. J. Tassell*, for the respondent, contended that the case was very similar to *Appleby* v. *Horseley Company*. Every test mentioned in *Jones* v. *Ocean Coal Company* for ascertaining whether the employment had not come to an end was applicable to this case. The question was really one of fact,

though the County Court Judge had spoken of it as a question of law.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the only question in the case was whether there had, in fact, been a break in the employment of this workman. The employers said that there had been no break, their object being to get a larger divisor for calculating the workman's average weekly earnings. The workman said that there had been a break, and the County Court Judge took that view. The case was treated before the County Court Judge on the basis of the man having been absent from work through illness for 11 weeks. The only question they had to consider was whether there was evidence on which the County Court Judge could find that that absence constituted a break in the employment. In his opinion there clearly was evidence on which the County Court Judge could so find, though no doubt there was evidence the other way also. The appeal therefore failed.

LORD JUSTICE COLLINS said he was of the same opinion.

LORD JUSTICE VAUGHAN WILLIAMS said he also was of the same opinion. He wished, however, to guard against seeming to hold that there could be no continuity of work unless there was continuity of the contractual engagement.

Solicitors: *Lewin & Birdseye, for the appellants; R. H. Bentley, agent for G. T. Baynes, Dartford, for the respondent.*

Also reported in 16 T. L. R. 56.
Consult (1899) 1 W. C. C. 94 *et seq.*, and *post.*

## WILLIAMS *v.* POULSON.

efore A. L. SMITH, COLLINS, and VAUGHAN WILLIAMS, L.JJ.

16 *T. L. R.* 42.

*Average weekly Earnings—Intermittent Employment.*—SCHED. I. 1.

A casual dock labourer worked not in any permanent employ but herever he could pick up a job. For 3½ days he had worked continuously r the respondent, and for the previous 10 months he had done some ork for him in each and every week but four.

*Held* that there was evidence of continuous employment.

THIS was an appeal from an award of the Judge of the iverpool County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant was a casual abourer, and at the time of the accidental injury for which e claimed compensation was in the employment of the espondent, who was a stevedore. The County Court Judge nade an award in favour of the applicant for a weekly payment of 7*s.* 6*d.* during his incapacity for work. The applicant ppealed.

Mr. *Ruegg, Q.C.*, and Mr. *Segar* appeared for the applicant, nd said the only question in the appeal was as to the proper asis for calculating the compensation to which the applicant vas entitled under sched. I. para. 1 (*b*), of the Workmen's Compensation Act, 1897. The applicant was a casual dock abourer, and was not in any permanent employment, but vorked sometimes for one stevedore and sometimes for nother. At the time of the accident he had been working or the respondent for three days and a half. During the revious year he had been engaged to work for a great umber of stevedores at different times, and he had worked nany times for the respondent. From March 5, 1898, to anuary 25, 1899, when the accident happened, he had

worked for the respondent in each week except four, though sometimes he only worked for one day in the week. There was, however, no continuous employment, the applicant being taken on when wanted. The County Court Judge had taken together all the periods during which the applicant had worked for the respondent, and found that the applicant's total wages during those periods amounted to £38 13*s.* 6*d.* He divided that sum by the number of weeks, and calculated the applicant's average weekly earnings to be about 15*s.*, and made an award for a weekly payment of half that sum. That, however, was not the proper method of assessing the compensation in this case under sched. I. By para. 1 (*b*) of sched. I. the Court had to consider the average weekly earnings for the period during which the workman had been continuously employed under the same employer—"*Jones* v. *Ocean Coal Company*" ([1899] 1 W. C. C. 94), "*Price* v. *Marsden & Sons*" ([1899] 1 W. C. C. 108). The applicant had been employed at the time of the accident for three days and a half, and during that time his earnings were 5*s.* a day, which gave an average weekly earnings of 30*s.* The County Court Judge ought to have made an award for a weekly payment of half that sum—viz. 15*s.* They also referred to "*Small* v. *McCormick*" (36 S.L.R. 700).

Mr. *Carver*, Q. C., and Mr. *Horridge* (Mr. *D.H. Crompton* with them), for the respondent, contended, first, that the applicant was not entitled to recover any compensation at all, because the Act did not apply. The Act only applied where there was continuous employment under the same employer for at least two weeks before the accident. There was no mode provided by the Act of assessing compensation where the employment was for a shorter period. [LORD JUSTICE COLLINS: You have no cross-appeal. You cannot, therefore, take that point now.] It could be taken for the purpose of defeating the appeal, not for the purpose of reducing the amount awarded. Secondly, if the Act did apply, the County Court Judge was right in awarding 7*s.* 6*d.* a week. He must be taken to have found continuous employment

with the respondent during the whole period from March 5, 1898, to January 25, 1899.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the sole question before them was, What was the amount of compensation payable to the applicant? Between March 5, 1898, and January 25, 1899, the applicant had been working for the respondent during a portion of each week, except on four occasions when he did not work for the respondent for some reason not appearing. There was no pretence for saying that there had been any break in the continuity of the employment. It had been decided in this Court in *Price* v. *Marsden & Sons*, and in Scotland in *Small* v. *McCormick*, that the workman must be in the employment of the same employer during the period in question, and other employments could not be taken into consideration in calculating the compensation. Now, it seemed to him that the County Court Judge had found in this case that the employment by the respondent continued without any break. In *Keast* v. *Barrow Hæmatite Company* ([1899] 1 W. C. C. 99) this Court held that if a man went away on a holiday, that was not a break in his employment. The County Court Judge seemed to have found that the applicant had been in the employment of the respondent during the period mentioned. The Judge then found that during that period the applicant had earned £38 13*s.* 6*d.*, and he divided that sum by the number of weeks during which the employment lasted, and he took one-half of the sum so found. That seemed to him to be right. It was not necessary to decide the very important point whether the Act applied at all where the employment continued for less than two weeks. It was enough to say that in this case the applicant had been awarded as much as he was entitled to.

LORD JUSTICE COLLINS concurred. The appeal must fail unless the applicant could show that the County Court Judge gave him less than he was entitled to. The Judge treated him as in the employment of the same employer during a number of weeks short of a year, and on that basis he had

assessed the compensation. Para. 1 (*b*) of sched. I. of the Workmen's Compensation Act, 1897, provided that in such a case the workman was to receive a weekly payment amounting to 50 per cent. of his average weekly earnings during the period in which he had been in the employment of the same employer. Mr. Ruegg's contention came to this, that where the workman had been employed only for a period less than a week by the employer the amount of compensation should be calculated as if he had been employed by the same employer for at least two weeks at the same rate of daily wages that he was earning at the time of the accident; and he got that out of the words in para. 1 (*b*) of sched. I. It was not for them to say whether in point of fact there was during the period over which the County Court Judge had calculated the weekly wages such a continuous employment by the same employer as would justify the award. That was a question of fact, and he (the Lord Justice) rather thought that the County Court Judge had found that there was a continuous employment by the same employer, though there might have been temporary gaps in the employment. But whether the Judge had so found as a fact or not, there was no appeal brought by the respondent, and therefore the question whether the employment was for less than two weeks and whether in such a case the Act applied at all was not open. The Court had, he assumed, to support the decision of the County Court Judge by all necessary conclusions of fact.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

Solicitors: *Lynsky, Liverpool, for the applicant; Morris, Allens, and Chapman, for Quiggin & Brothers, Liverpool, for the respondent.*

Also reported in 63 J. P. 757; 16 T. L. R. 42.

Consult *Hewlett* v. *Hepburn* (*ante*, p. 123), and the cases there referred to.

# OSBORN *v.* VICKERS, SONS, & MAXIM (LIMITED).

Before COLLINS, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 333.

*Medical Examination—Right to—No Notice of Accident.*—SCHED. I. 3.

Sched. I., para. 3, is operative in arbitration proceedings, although no notice of accident has been served. The right to have a medical examination under this paragraph is not subject to any condition save that the employer shall pay the medical practitioner provided by him.

THIS was an appeal from the award of Judge Waddy, Q.C., sitting at the Sheffield County Court in proceedings to assess compensation under the Workmen's Compensation Act, 1897. The respondent, Robert David Osborn, was an iron planer in the employment of the appellants, Vickers, Sons, & Maxim (Limited), at the River Don Works, Sheffield, and on March 20, 1899, he was injured by an accident arising out of and in the course of his employment. His average weekly earnings had amounted to £2. The doctor attached to the appellants' firm, who was employed and paid by them, attended him. The appellants paid the respondent £1 a week from the first fortnight after the accident. In August another doctor was called in to examine him in consultation with the firm's medical man. On October 21 the firm's doctor reported that the respondent had completely recovered from the accident, and the appellants thereupon discontinued paying him the £1 a week. On December 5 the respondent filed with the Registrar of the County Court a request for arbitration to assess the compensation payable to him under the Act. No notice of the accident had been given. The appellants in their answer did not take the objection that no notice of the accident had been given, nor that the claim for compensation

was not made within six months from the occurrence of the accident. They stated in their answer that they had paid compensation to the respondent from 14 days after the date of the accident up to October 21 at the rate of £1 per week, and they denied their liability to pay further compensation in respect of the injury on the ground that the respondent was not then suffering from the effects of the accident, and that if he was incapacitated from working it was from causes independent of and apart from the accident. The appellants thereupon desired to have the respondent examined by a medical man under para. 3 of sched. I., but the respondent's solicitor refused to consent unless the appellants paid the fee for the attendance of the respondent's medical man at the examination. On December 27 the appellants filed a supplemental answer stating the refusal of the respondent to submit himself to a medical examination as required by the appellants in accordance with para. 3 of sched. I. The hearing of the arbitration was fixed for January 5, 1900, and upon that day the appellants applied for a stay of proceedings upon the ground that the respondent had refused to submit himself to a medical examination as required. The County Court Judge ordered that there should be no stay of proceedings, but that the respondent should submit himself for examination by a duly qualified medical practitioner on the appellants' behalf, the appellants paying the respondent £1 1*s*. for the attendance of a medical practitioner on his behalf on such examination, and he adjourned the hearing of the arbitration. The appellants contended that the County Court Judge had no power to impose the condition that they should pay for the attendance of the respondent's medical man at the examination. By para. 3 of sched. I., "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation and any proceeding under this Act in relation

to compensation shall be suspended until such examination takes place."

Mr. *Ruegg*, Q.C., and Mr. *Arthur Sims*, for the appellants, contended that the County Court Judge had no power to impose the condition which he did. Para. 3 of sched. I. was imperative. The respondent could not say that the paragraph did not apply on the ground that no notice of the accident had been given. The appellants in their answer did not take that point, the sole question being whether the respondent had recovered from the effects of the accident, and therefore the case must be treated as if every step in the proceedings had been properly taken. If the appellants had intended to raise the point that no notice of the accident had been given, or that the claim for compensation was made too late, they would have been bound, under rule 17 (1) of the Workmen's Compensation Rules, 1898, to have taken the objection in their answer.

Mr. *Israel Davis*, for the respondent, contended that para. 3 did not apply, as no notice of the accident had been given. The paragraph was governed by the words, "Where a workman has given notice of an accident." He also contended that the Judge had a discretion under the paragraph to impose the condition. The respondent had already been examined by a medical man in the preceding August, and the Judge might well have thought that if the appellants wanted to have him examined again they should pay the respondent's expenses in the matter.

The COURT allowed the appeal.

LORD JUSTICE COLLINS said that in his opinion the County Court Judge was wrong. The application for the examination of the workman was made under para. 3 of sched. I. The workman was injured by an accident while in the employment of his masters. No notice of the accident appeared to have been given, but the workman was attended by the doctor employed and paid by the masters. The workman was paid a weekly sum of £1, being 50 per cent. of his former average weekly earnings, for a considerable period

after the accident. On one occasion a consultation took place between the doctor employed by the masters and another doctor who was called in to advise as to the treatment to be adopted. Then came the time when the doctor thought that the workman had recovered from the effects of the accident. The workman was of a different opinion, and proceedings were taken by him to have the compensation to which he claimed to be entitled under the Act of 1897 assessed by arbitration. No objection was taken by the masters that no notice of the accident had been given, nor that the claim for compensation was made after the expiration of six months from the occurrence of the accident. By sec. 2, sub-sec. 1, of the Act of 1897, "proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof . . . and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or in case of death within six months from the time of death. Provided that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." The workman having started these proceedings without giving notice of action, and after six months had expired, now said that, notwithstanding that he was in default in not giving notice of the accident, he could now turn round and allege that it was a condition precedent to his examination by a medical man that he should have given notice of the accident. To his Lordship's mind that was an impossible position for the workman to take. In order to get rid of the vice of not having given notice of the accident the workman must be deemed to have shown, or the masters must be taken to have admitted, that the latter were not prejudiced by the want of

notice. Therefore, the workman took these proceedings, subject to the right of the masters to insist upon his submitting himself to a medical examination as required by para. 3 of sched. I., just as if notice of the accident had been given. In truth, this point was taken for the first time in this Court. It was not taken before the County Court Judge. The application by the masters that the workman should submit himself to an examination by a medical man on their behalf was met at the hearing by a request that the order should only be made upon condition that the masters paid for the attendance of the workman's doctor at the examination. It was also said that the workman had been already medically examined by a doctor in August last on behalf of the masters. But that objection was quite irrelevant, because the doctor was called in for the benefit of the workman himself to consult with the doctor who was attending him as to his treatment. It was not an examination under any provision of the Act, but was only done by voluntary arrangement betwen the masters and the workman. If an obligation to submit to medical examination existed under the Act, it was immaterial that the workman had previously allowed himself to be examined by another medical man for a different purpose not under the Act. The masters therefore had a right to require the workman to be examined by a medical practitioner employed and paid by them. That being so, what jurisdiction had the County Court Judge to impose the condition that the masters should pay the fee of the workman's doctor for his attendance upon the examination? He (the Lord Justice) did not say that there might not be very special circumstances which would make it reasonable, and it might be almost necessary, on account of the state of health of the workman, to have the workman's own medical man present at the examination. That might be a possible case as to which he would say nothing. But no such case was made out here. The only point taken was that the County Court Judge had a right to impose the condition which he did when making the order. In his opinion,

it was *extra vires* of the Judge to impose such a condition. The appeal must therefore be allowed.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER agreed.

Solicitors: *H. G. Campion & Co., for Clegg & Sons, Sheffield, for the appellants; Halse, Trustram, & Co., for A. Muir Wilson, Sheffield, for the respondent.*

Also reported in (1900) 2 Q. B. 91; 69 L. J. Q. B. 606; 82 L. T. 491; 16 T. L. R. 333.

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## DANIEL *v.* THE OCEAN COAL COMPANY (LIMITED).

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 368.

*Compensation, to whom payable—Money invested in Registrar's Name.*—SCHED. I., paras. 4, 5, 6, *and* 7.

Compensation ordered to be invested by the registrar under sched. I. 7, may be paid direct to the registrar.

THIS was an appeal from an award of the Judge of the Pontypridd County Court in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation was Mary Daniel, the widow of a workman who had met with his death in consequence of accidental injuries sustained by him in the course of his employment. The applicant had taken out letters of administration to her deceased husband's estate, and had thereby become his legal personal representative. The County Court Judge by his award ordered that the respondents, the Ocean Coal Company (Limited), should pay the sum of £246 7*s.* to the dependants of the deceased workman as compensation, and

he declared that the persons entitled to share in such compensation as dependants were Mary Daniel, the widow, and Evan David Daniel and William John Daniel, the infant sons of the deceased. And he ordered that the said sum of £246 7*s.* be apportioned as follows, viz.:—£146 7*s.* to and for the benefit of the widow and £100 to and for the benefit of the sons in equal shares; and he ordered that the sum of £146 7*s.* apportioned to and for the benefit of the widow should be paid to her, and that the sum of £100 apportioned to and for the benefit of the sons should be paid to the registrar of the County Court and should be invested by the registrar in his name in the Post Office Savings Bank for the benefit of the sons. The applicant appealed from this award, and it was contended on her behalf that the County Court Judge had no power to make an order in these terms, but that, inasmuch as she was the legal personal representative of the deceased, the County Court Judge was bound, by para. 4 of sched. I., to order the whole of the compensation to be paid to her.

Mr. *Cripps*, Q.C. (Mr. *Rhys Williams* with him), appeared for the applicant, and said that the words of para. 4 were express:—"The payment shall, in case of death, be made to the legal personal representative of the workman." This was not qualified by para. 6, which provided for the sum allotted as compensation being invested for the benefit of the person entitled thereto. [LORD JUSTICE VAUGHAN WILLIAMS: Mr. Minton-Senhouse, in his book "Accidents to Workmen," in a note to para. 4, at p. 166, says—"He"—that is, the legal personal representative—"does not, however, receive it as personal representative of the deceased workman, nor is it part of the workman's estate or liable for his debts. He holds it as a trustee under the statute."]

Mr. *Ruegg*, Q.C., and Mr. *Anton Bertram*, for the respondents, were not called upon to argue.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, paras. 4, 5, 6, and 7 of sched. I. to the Workmen's Compensation

Act must be read together. By para. 4, "The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other persons entitled thereto under this Act." By para. 5, "Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act." By para. 6, "The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto as agreed, or as ordered by the committee or other arbitrator." By para. 7, "Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the County Court in his name as registrar." Reading all those paragraphs together, he had no doubt that the County Court Judge had power to make the order which he had made in this case. The appeal would, therefore, be dismissed; but, as the question raised on the appeal did not concern the respondents, it would be dismissed without costs.

LORD JUSTICE VAUGHAN WILLIAMS and LORD JUSTICE ROMER concurred.

Solicitors: *Walter Morgan, Bruce, & Co., Pontypridd, for the applicant; H. P. Becher, agent for Simons & Sons, Pontypridd, for the respondents.*

Also reported in (1900) 2 Q. B. 250; 69 L. J. Q. B. 567; 82 L. T. 523; 48 W. R. 467; 64 J. P. 436; 16 T. L. R. 368.

Consult "Accidents to Workmen."

# BRADBURY *v.* BEDWORTH COAL AND IRON COMPANY.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

*The Times, March* 17, 1900.

*Review—Implied Agreement—Evidence of.*—SEC. 1, 3, *and* SCHED. I. 12.

A review of weekly payments by the parties themselves may take place. Such a review and an agreement may be implied.

Compensation was paid from August 22 to September 23, when the man returned to work at full wages. This he continued to do till November 16, when he was discharged because the pit was closed. For the next three months he applied for work, but there was none for him to do.

*Held* that there was evidence that on September 23 the weekly payment was reviewed and ended by mutual consent.

THIS was an appeal from the decision of Judge Wightman Wood, sitting at Nuneaton County Court, under the Workmen's Compensation Act, 1897. The case had been already before the Court of Appeal upon a former occasion, when it was sent back to the County Court Judge for further findings of fact. The appellant, Bradbury, was a collier in the employment of the respondents, the Bedworth Coal and Iron Company. On July 28, 1898, the appellant, while at work in the respondents' colliery, received an injury to his eye. He thereupon ceased work, and on August 22 he handed to the respondents' manager a document in the following terms:—"My wages for the time worked as dataller and stallman and header during the past year have averaged 5*s.* 3*d.* per day, and between four-and-three-quarters and five days' average per week. My claim upon the company is from Friday, August 12, inclusive." The respondents agreed to pay him 12*s.* a week, and did so for six weeks. On September 23 the respondents' manager asked the appellant if

he could go back to work, and the manager told him (according to the appellant's evidence) that if he would try and could not do his usual work he (the manager) would find him something else. The appellant thereupon went back to work at the same wages as before. On November 16 the appellant was dismissed, after a fortnight's notice, with other men, because the respondents were ceasing to work that part of the mine where he had ceased to be employed. He remained out of work, and applied to the respondents for work, but without result. At the end of 1898 or beginning of 1899 his eye gave him trouble again, and he was admitted an out-patient at the Birmingham Eye Hospital. He made no further claim until February 9, 1899, when a fresh claim was made under the Act, which was admitted to be out of time; and that claim was followed by proceedings for arbitration. The appellant, however, contended that the claim of August 22 was in time and was a "claim for compensation" within sec. 2, sub-sec. 1, of the Workmen's Compensation Act, 1897. The County Court Judge held that the document of August 22, 1898, was a "claim for compensation" within the Act, and that, therefore, the proceedings for arbitration were in time. The Judge, however, found (1) that it was the intention of the parties to settle the claim by agreement; (2) that they came to an agreement on August 22, 1898, in satisfaction of the claim; (3) that the agreement was that the appellant should receive a weekly payment of 12*s.* during his incapacity for work resulting from the accident; (4) that no limit of time for the continuance of the weekly payment was specified or intended to be specified, it being the intention of the parties that the compensation should be payable in accordance with and subject to the provisions of the Workmen's Compensation Act, 1897, and that the parties should be in the same position as if the appellant had by consent of the respondents obtained an award for a weekly payment of 12*s.* under the Act; (5) that on or about September 23, 1898, or as soon thereafter as the appellant had made trial of his capacity for work and applied

for wages, the weekly payment was reviewed and ended (within the meaning of sched. I., para. 12, to the Act) by mutual consent; and (6) that it was not in the contemplation of either party in August or September, 1898, that the incapacity might prove to be intermittent, and that no claim or agreement was made to meet such event until the claim was made on February 9, 1899. The Judge, therefore, made an award in favour of the respondents.

Mr. *R. M. Bray*, Q.C., and Mr. *T. W. Chitty* appeared for the appellant; Mr. *Ruegg*, Q.C., and Mr. *F. W. Sherwood* appeared for the respondents.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the facts were that on August 22 there was an agreement to pay the appellant 12*s*. a week. On September 23 the appellant went back to work at the old wages. He remained on at work until November 16, when the pit was closed and the workmen were discharged. Between that date and February 9, 1899, the appellant asked for work and the respondents told him that they had none to give him. On February 9 a fresh claim was made, and proceedings for arbitration were subsequently taken. That claim was clearly too late. In his Lordship's opinion, it was not necessary to decide whether "the claim for compensation" was made in time, because there was evidence to justify the finding of the County Court Judge that on or about September 23, when the appellant went back to work, the weekly payment of 12*s*. was "reviewed and ended by mutual consent." The appeal must therefore be dismissed.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Also reported in *The Times*, March 17, 1900.
Consult "Accidents to Workmen." *Crossfield* v. *Tanian* (*post*).

## CROSSFIELD & SONS *v.* TANIAN.

Before A. L. SMITH, VAUGHAN WILLIAMS, and ROMER, L.JJ.

16 *T. L. R.* 476.

*Review—Fresh Facts.*—SCHED. I. 12.

Weekly payments can only be reviewed if the circumstances have altered since the last award was made; because otherwise the review would amount to a rehearing of the arbitration, which is not permissible.

THIS was an appeal from the refusal of the Judge of the Warrington County Court to review an award made in an arbitration under the Workmen's Compensation Act, 1897. The applicant for compensation, Patrick Tanian, was a labourer in the employment of Messrs. Crossfield & Sons, and in the course of his employment he met with an accident which resulted in the loss of his right eye. The applicant duly filed a request for arbitration, and in the particulars annexed to the request he stated that his weekly wages before the accident were 30*s.*, and that at the time of filing the request he was earning wages at the rate of 17*s.* 1*d.* a week. The employers filed an answer, in which they stated that the applicant's weekly wages before the accident were not 30*s.*, but 19*s.* 10½*d.* This answer, however, was only filed two days before the hearing of the arbitration, whereas Rule 17 of the Workmen's Compensation Rules, 1898, requires that the respondent's answer shall be filed "ten clear days at least before the day fixed for proceeding with the arbitration." At the hearing the County Court Judge, finding that the employer's answer was out of time, considered himself bound to accept the applicant's statement contained in the particulars, and he made an award in the applicant's favour for a

weekly payment of 12*s.* 6*d.* The award was made in August, 1899. In March, 1900, the employers applied to the County Court Judge, under para. 12 of sched. I. to the Workmen's Compensation Act, asking that the weekly payment might be reviewed. The County Court Judge declined to accede to the application. The employers appealed. It was not suggested on their behalf that any change had taken place in the circumstances of the case between the making of the award and the application for a review, but it was contended that, on the true construction of para. 12 of sched. I., it was open to either party at any time to apply for a review of the weekly payment. Para. 12 is as follows:—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the *maximum* above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

Mr. *Arthur Powell* appeared for the employers, Mr. *W. D. Benson* for the workman.

The COURT, without calling upon counsel for the workman, dismissed the appeal, Lord Justice Vaughan Williams doubting.

LORD JUSTICE A. L. SMITH said that what they had to consider was the true meaning of para. 12 of sched. I. to the Workmen's Compensation Act. The question was whether employers could apply under that paragraph for a review of a weekly payment where the circumstances, which existed at the time of the making of the award, had not in any way altered at the time of making the application for a review. An award had been made in this case by the County Court Judge, who had before him the statement of the workman that his weekly wages before the accident were 30*s.* The employers desired to show that the workman's wages had been 19*s.* 10½*d.* But the County Court Judge held that, as the employers had not filed their answer five days before the hearing, in accordance with the rules, they were out of order,

and it was not open to them to take this point, and he therefore made an award on the basis of the workman's statement. The award was made in August, 1899. It was clear that the County Court Judge had not made any mistake in dealing with the case as he had done, neither was any appeal brought against the award. But in March, 1900, the employers applied under para. 12 of sched. I. for a review of the weekly payment which the County Court Judge had awarded. The question arose, What change had taken place in the circumstances of the case since the making of the award? The answer was that no change whatever had taken place. The point which the employers really wished to raise was that the award was wrong, because the County Court Judge ought to have found that the workman's wages before the accident were 19*s.* 10½*d.* But could the employers in an application under para. 12 show that the award was wrong? In his opinion they could not. Para. 12 was passed *alio intuitu* altogether. It contemplated that an injured workman might get well, or, at any rate, he might get better, or he might get worse. And accordingly it enacted that any weekly payment —not any award—might be reviewed at the request either of the employer or of the workman, and on such review might be ended—that was to say, if the workman got well—or diminished if he got better, or increased if he got worse. He thought that the decision of the County Court Judge refusing to review the weekly payment was right, and that the appeal ought to be dismissed.

LORD JUSTICE VAUGHAN WILLIAMS said he agreed that it would be manifestly unfortunate if para. 12 of sched. I. to the Workmen's Compensation Act could be used for the purpose of appealing against any award which one party or the other did not like. He felt sure that the Legislature did not intend this enactment to be used for such purpose. But though he felt this, on the other hand he knew no duty of the Court which it was more difficult to exercise, or which, in his opinion, ought to be more sparingly exercised, than what he might call the power of interlinear legislation, that

was to say, of introducing into an Act of Parliament words which were not there. What were the words of this enactment? "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the *maximum* above provided." It was suggested that in the exercise of the powers which the Court had of interlinear legislation they should read in the words "if the circumstances are changed." He could not feel that there was any necessity for introducing those words into the enactment. But whether that were so or not, it seemed to him that the employers now proposed to show the existence of circumstances which were different from the circumstances which were before the County Court Judge on the original hearing. It was said that they could not do that, because they were estopped by the previous award. He was not sure that that was so. In the first place, an award was not a judgment so as to operate technically as an estoppel. And, in the second place, if abstract Justice required them to say whether there ought not to be an estoppel, he could not help seeing that this was a case in which the question of amount had never been determined on the merits at all. It might be that the result was that there was an estoppel, but he could never feel sure. At any rate, he hesitated to read into the Act words which were not there.

LORD JUSTICE ROMER said that this was an attempt to reopen an arbitration and impeach an original award on the ground that facts were admitted at the hearing which should have been contested. This was done under cover of an application made under para. 12 of sched. I. In his opinion that paragraph was directed to another purpose, and was not intended to enable an award to be impeached on any such ground. He thought that it applied to cases in which some change in the circumstances had taken place since the date of the award. Here there had been no such change, no new fact had intervened. It seemed to him that, if the appeal were allowed, it would lead to great abuse. Whenever

a party was dissatisfied with an award, he could keep on having fresh arbitrations until he obtained an award in his favour.

Solicitors: *W. Hurd & Son, for the employers; Cuncliffes & Davenport, agents for Davis & Forshaw, Warrington, for the applicant.*

Also reported in 82 L. T. 813; 48 W. R. 609; 16 T. L. R. 476.
Consult *Bradbury* v. *Bedworth Coal and Iron Co.* (*ante*, p. 138).

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## WELLAND *v.* GREAT WESTERN RAILWAY COMPANY.

Before A. L. SMITH, COLLINS, and ROMER, L.JJ.

16 *T. L. R.* 297.

*Costs—Taxation.*—SCHED. II. 6.

An arbitrator can award a lump sum for costs without taxation.

THIS was a matter arising out of an arbitration under the Workmen's Compensation Act, 1897, in which the applicant, a young man in the employment of the Great Western Railway Company, sought compensation for personal injury accidentally sustained by him in the course of his employment. The company admitted liability under the Act, and offered the applicant a weekly payment of 7*s.* 6*d.*, but this offer was not accepted. The case came on for hearing before the Judge of the County Court of Devonshire, who said that the applicant ought to have accepted the offer, and refused to make an award. The applicant thereupon appealed to the Court of Appeal, who made an order on February 5, remitting the case to the County Court Judge to further proceed thereon, and further ordering that the respondents should pay to the applicant his costs of the former hearing before the County Court Judge. On February 24 the County Court Judge

made an award in favour of the applicant for a weekly payment of 7*s.* 6*d.*, and he ordered the respondents to pay the applicant's costs, which he fixed at the sum of £5. On March 12 a further application was made to this Court on behalf of the applicant, on which the Court made an order calling upon the County Court Judge to show cause why he should not give directions for taxation of the costs between the applicant and the respondents in pursuance of the order of February 5, or make such award or give directions as might be necessary to give effect to the said order.

Mr. *J. W. St. L. Leslie* (Mr. *Cripps*, Q.C., with him) now appeared for the respondents, the railway company, and said that the registrar of the County Court was present to represent the County Court Judge. He contended that the County Court Judge had made an award in compliance with the order of this Court. He had acted within his discretion in fixing the costs at £5. By Rule 33, para. 3, of the Workmen's Compensation Rules, 1898, "The Judge or arbitrator, in dealing with the question of costs, may take into consideration any offer of compensation proved to have been made on behalf of the employer." Here the costs had been unduly inflated, the applicant's solicitor having carried in a bill for £41. Further, the applicant had adopted a wrong course in taking these proceedings in this Court. This was really an application for an order in the nature of a *mandamus*, and it ought to have been made in the High Court. By section 131 of the County Courts Act, 1888, "No writ of *mandamus* shall issue to a Judge or an officer of the Court for refusing to do any act relating to the duties of his office, but any party requiring such act to be done may apply to the High Court, upon an affidavit of the facts, for an order or summons calling upon such Judge or officer of the Court, and also the party to be affected by such act, to show cause why such act should not be done."

Mr. *Loosemore* appeared for the applicant, and contended that by para. 6 of sched. II. the applicant was entitled to have his costs taxed in manner prescribed by the rules. Here

the County Court Judge had not directed the costs to be taxed at all.

The COURT discharged the order to show cause.

LORD JUSTICE A. L. SMITH said he thought the application ought to be dismissed on two grounds. The applicant was seeking an order in the nature of a *mandamus* to the County Court Judge to do his duty, and he ought to have gone to the High Court for that. In his opinion this Court had no jurisdiction to entertain the matter. Further, he thought the County Court Judge had done his duty. Rule 33, para. 3, of the Workmen's Compensation Rules had not been called to the attention of the Court when this case was last before them. If it had been, the Court would not have granted the rule to show cause.

LORD JUSTICE COLLINS and LORD JUSTICE ROMER concurred.

Also reported in 16 T. L. R. 297.
Consult "Accidents to Workmen."

# CASES

DETERMINED IN

# THE COUNTY COURTS.

## STATHAM *v.* GALLOWAYS LIMITED.

109 *Law Times*, 133.

*Arising out of and in the course of.*—SEC. 1, 1.

An accident that occurs while a man is complying with an order which though he knows or ought to know he need not obey because it is against the rules, but which is given to him by one from whom he receives his orders, may nevertheless be an accident arising out of and in the course of the employment.

THIS was an application made to his Honour JUDGE PARRY at the Manchester County Court by Thomas Statham, a labourer, who was employed at the branch ironworks of Galloways Limited, and who sustained injuries in the works to his foot. Statham was working under the direction of an apprentice named Kirk, the applicant's duty being to guide certain iron bands brought to a red heat round a cylinder for the purpose of being bent. Something was wrong with the machinery in charge of Kirk, and he called the applicant to assist him. In obeying the order of Kirk he passed near the cogwheels of the machine and sustained the injury.

*C. E. Smith* (*Salomonson & Smith*) for the applicant.

*W. Cobbett*, for the respondents, contended that Kirk

directed the applicant to do something he was not authorized to ask him to do, and that in complying with the request the applicant placed himself outside the provisions of the Act.

Judgment was reserved.

His Honour, in giving judgment, said the question here was, When a superior workman gave an order which, in relation to their work, an inferior workman knew or ought to know he should not obey, it being against the rules of the establishment, and injury followed obedience to the order, was the inferior workman outside the Workmen's Compensation Act? The facts were that the applicant worked as a labourer in respondents' works. He worked with an apprentice, and was bound to obey the apprentice's orders. In a general way, if Kirk, the apprentice, said "Do this," the applicant was bound to do it. Their work was to roll bands at a machine 27 feet away from where the accident happened. They neither of them ought to have touched the machinery. A strap fork in the machine broke, and Kirk found he could not work the lever of the roller. He ought to have gone and spoken to the smith or foreman, and got the machine put right. What he did was to go to the machine and, while it was in motion, endeavour to right it, and while he was endeavouring to do this he called out to the applicant, "Give me a pull." The applicant, to his (the Judge's) thinking, was a very straightforward witness, and did not seek to make his case better than it was. He (the Judge) came to the conclusion, in fact, that at the moment he was called and set out to obey the order he had no idea what he was going to be asked to do, but that upon reaching the machinery and before he stepped over the low wall near the machine, he knew, or at least he ought to have known, that Kirk was meddling with machinery in motion, that Kirk ought not to have ordered him to give any assistance, and that he would be justified in disobeying Kirk's order. The man was not charged with serious and wilful misconduct, but it was said the accident did not arise out of and in the course of his employment. Knowing that the intention of

the Legislature was to make the Act an automatic scheme of workmen's compensation or insurance, he at first regarded the words "arising out of and in the course of his employment" to mean "during" the employment or while he was employed. But in the cases of *Lowe* v. *Pearson* (1899) 1 W. C. C. 5, and *Smith* v. *Lancashire & Yorkshire Railway Company* (1899) 1 W. C. C. 1, the Court of Appeal had pointed out that they meant much more than that, and that in each case one must decide a very difficult question of fact—namely, whether at the moment of the accident the man was doing something his master had expressly or (since the case of *Rees* v. *Thomas* (1899) 1 W. C. C. 9) impliedly ordered him to do. He regretted those decisions, because they were bound to lead to much uncertainty and litigation, which a different interpretation would have avoided, but of course he desired in every case before him to apply those decisions and interpret the Act strictly in accordance with them. In the present case he did not think any of the judgments given in *Lowe* v. *Pearson* and *Smith* v. *Lancashire & Yorkshire Railway* really concluded the matter. Discipline and obedience to orders were the mainspring of the workshop, and if in every shop the workman was to criticise the orders he received and discuss whether the man who gave them was acting within his duty, then it would be high time for workshops to close their doors. He understood the Court of Appeal to have said that if a man who knew the scope of his own employment chose to step outside it he stepped at the same time outside the provisions of the Workmen's Compensation Act. But where he was ordered by a superior to do something out of the scope of his employment the case seemed to him different. Obedience was a duty. It was not for a workman to reason why when he was ordered to do anything; he was simply to obey. Supposing, in this case, he had refused and pointed to the notice which was posted up, Kirk would probably have told him that the notice only applied to cleaning machinery and not to putting a breakdown in order; was he to argue the matter with Kirk? He

(the Judge) thought not. He thought the accident arose "in the course of" his employment, and he thought it also arose "out of" his employment, because all workmen, to his mind, were employed to obey orders and not to argue about them. That the Legislature intended such a case as this to be within their scheme of insurance no one could doubt for a moment, and he thought it was still open to him to so interpret the Act as to carry out its intention. There would therefore be judgment for the applicant, with 12*s.* a week during incapacity, and costs on scale B.

Consult *Harrison* v. *Whitaker* (*ante*, p. 12), and the cases there referred to.

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## PEARCE *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

*The Times, November* 21, 1899.

*Arising out of and in the course of.*—SEC. 1, 1.

A man met with an accident on the scene of his work while going to relieve nature during the breakfast hour.

*Held* that the accident did not arise out of and in the course of his employment.

AT the Southwark County Court, his Honour JUDGE ADDISON, Q.C., gave judgment in an important case under the Workmen's Compensation Act. The applicant was Frederick Pearce, a painter, and the respondents were the London and South-Western Railway Company. Mr. *Crawford* and Mr. *E. L. Hartley* were for the applicant; and Mr. *R. B. D. Acland* for the respondents. The applicant's case was that on May 27 he was engaged with other men putting the finishing touches to Hampton Court railway station, which had been reconstructed by his employers, Messrs. Perry & Co., Contractors. During his breakfast time he was leaving the back

of a shed between the rails in order to relieve nature, when he was knocked down by a light engine, and his right foot was cut off. Mr. *Acland* contended that the accident did not "arise out of and in the course of his employment," and further that the work on which he was engaged was "merely ancillary and incidental to, and" was "no part of or process in, the trade or business carried on by" the railway company. The business of a railway company was merely the carriage of goods and passengers, and this could have been carried on perfectly without this work being done. His Honour, having taken time to consider the matter, found that the work of reconstructing a station was merely ancillary and incidental to the business or trade of a railway company, and not part of it. Further, the reason for which the applicant had gone to the back of the shed could not be said to arise out of his employment. Consequently, he was obliged to find for the respondents; but as it was a matter of law, he would afford him every facility in his power to enable him to appeal.

Also reported in *The Times*, November 21, 1899.

The first point was confirmed by the Court of Appeal, *ante*, p. 47.

Consult *Harrison* v. *Whitaker* (*ante*, p. 12), and the cases there referred to.

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## RUSSELL *v.* HOLME.

108 *Law Times*, 373.

*Amount of Compensation—Partial Incapacity.*—Sched. I. 1 (*b*) and 12.

A workman earned £2 a week before, and £1 10*s.* a week after the accident. It was *held* that the loss of 10*s.* a week should be borne equally by the employer and the workman. An award was therefore made for 5*s.* a week.

At the Clerkenwell County Court, in the matter of the Workmen's Compensation Act, 1897, and in the matter of an arbitration between John Russell and E. H. Holme (respondent), his Honour Judge Edge has given the following

judgment:—This is an application to review the weekly payment of 20*s.* per week agreed to be paid to the applicant by the respondent under the Workmen's Compensation Act, 1897. The workman in this case was injured on August 1 last, and was wholly incapacitated from following his employment until October 23 following. Prior to the accident he was working under an agreement of service by which he had engaged to serve the respondent for a period of two years from October 8, 1898, at a wage of £2 per week. After the accident an agreement was come to (nominally with the respondent, but really with an insurance company with whom the respondent had insured) that the applicant should receive 20*s.* per week as compensation under the Act during his incapacity. The insurance company paid that sum to the respondent, who paid it to the applicant, but, in addition, the respondent continued to pay him his full weekly wages of £2, so that up to October 23, when the applicant returned to work, he received £3 per week, or £1 per week beyond his ordinary wages. It was stated by the respondent, and I have no reason to doubt his statement, that this sum was paid out of compassion to the applicant and not as wages, but a difficulty has been raised as to how far this should be taken into account, under para. 1 (2), of sched. I. to the Act, in fixing future weekly payments. The respondent has continued from October 23 to December 30 to pay the applicant at the rate of £2 per week, but the insurance company declined to pay the 20*s.* per week subsequent to the former date, and submit that as by their policy of assurance they have all the rights as well as the liabilities of the respondent in the matter, and have the authority of the respondent to use his name in these proceedings, they are as well as the respondent absolved from making any further payment to the applicant as compensation between those dates. In my opinion I ought not to recognize the insurance company, as such, in this application, but must treat it as if made by the respondent, and must give it the same consideration and have regard to all

the circumstances of the case as if the respondent was alone seeking to review the weekly payments. As I have said, the applicant resumed work on October 23, but was unable and still continues unable to do the work he did previous to the accident, which appears to have seriously affected his eyesight. It is said, and again I have no ground for questioning the statement, that for a month afterwards he was not worth much, but he was an old and valued servant, and consequently the respondent continued to pay him the £2 per week until December 30 last, when he gave applicant notice that he was obliged to reduce applicant's wages to 30*s.* per week, that being what he considered the applicant was able to earn. Consequently the applicant has, since he returned to work and up to December 30, continued to receive from the respondent the same wages as he received prior to the accident, and has therefore not suffered any pecuniary loss. It may be that he did not earn the whole of the £2, but bearing in mind that this is an application against the respondent, that he generously gave applicant £2 per week for nearly three months from the date of the accident when he was not earning anything, and that I have no evidence as to his precise earning capacity from October 23 to December 30, I do not think I ought to make any order upon respondent for payment of any further sum between those dates. From December 30 there is no doubt that the applicant has been unable to earn what he was able to earn before the accident by 10*s.* per week, and the question is whether the weekly payment should be diminished to that sum or to some lesser amount. If I reduced the amount to 10*s.* per week, the applicant would receive the same amount of wages as he received before the accident, and it is submitted by the learned counsel for the respondent that that would be contrary to the policy of the Act, which contemplates a division of the loss between the master and the workman. The wording of the Act, sched. I., para. 1 (*b*), is somewhat confusing, as it treats of total and partial incapacity on the same footing, but in either case the Court cannot give more than 50 per cent. of the

workman's average weekly earnings, and not exceeding 20*s.* per week. If, therefore, this had been an original application under that clause for partial incapacity, I should have been precluded from giving more than 50 per cent. of the applicant's weekly earnings, and in fixing the weekly payment I should have, under para. 2, to have regard to the "difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident," etc. In my judgment this shows the intention of the Legislature to be that not more than one-half the loss should be borne by the employer, otherwise this result would follow, that a workman totally incapacitated could only recover one-half his average earnings not exceeding 20*s.* per week, whilst a workman partially incapacitated only might recover his full wages, as in this case. This being my view of the provisions of the statute, I award that the weekly payment be reduced to 5*s.* per week as and from December 30 last.

*Powell* of counsel for respondent; *Scarlet* of counsel for applicant.

It would appear from the case of *Ellis* v. *Knott* (*ante*, p. 116) that an award based upon the reasons on which the learned judge proceeded in this case could not be set aside, as the amount subject to certain limitations is in the discretion of the arbitrator.

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## PATTINSON *v.* STEVENSON.

109 *Law Times*, 106.

*Lump sum—Measure of.*—SCHED. I. 13.

The measure of a lump sum for the redemption of a weekly payment, is an annuity for life less a deduction in respect of (1) the contingency of improvement in condition, and (2) the contingency of death at an earlier age than that of the average human life.

THIS case was heard in the Marylebone County Court, before his Honour JUDGE STONOR.

*Duckworth* for the applicants; *Giveen* for the respondent.

This was an application by employers for the redemption of a weekly payment of £1 payable to the respondent, a workman, under the Workmen's Compensation Act, 1897, from December 21, 1898, by virtue of an agreement, dated February 27, 1899, made between the parties, which had been duly paid up to the date of the application. It was agreed between the parties that the sum of £750 should be taken as the actuarial value of the payment for the life of the respondent.

The following evidence was given by Mr. Arthur Murrell, a duly qualified medical man. On January 19 I took the leg out of the plaster, and I found that both bones in the lower portion of the respondent's leg were fractured, and that the injury involved the fracture of an ankle bone. I attended him until February 14. I examined his leg on February 12, and again to-day. It would be entirely unsafe for him to attempt to mount scaffolds or ladders. His foot will not bend properly, and I consider that it will not very much improve. I cannot detect any improvement at all since February 10. He is likely to remain incapacitated from doing his usual work on buildings. In going up a ladder he would not be able to bend his foot and toes properly. The injury makes him lame. He will be able to do work on the ground.

His Honour held that there was no limit to the amount payable on the redemption of the weekly payment in question under the Workmen's Compensation Act or otherwise, and that the respondent was entitled to the actuarial value of the weekly payment, viz. £750, less a deduction in respect (1) of the contingency of his condition improving, in which case if the weekly payments continued they would partially or wholly cease; and also in respect of (2) the contingency of his dying at an earlier age than the average of human life contemplated in the actuarial value; and he deducted £150 (20 per cent.) in respect of the same, and made an award for the redemption of the weekly payment of £1 in question at the sum of £600, the weekly payment to be continued for

twenty-one days, and if an appeal be presented, pending the appeal, and the amount of such future payments to be deducted from the said sum of £600.

Award £600, with costs of application.

This decision was affirmed by the Court of Appeal (Smith, Williams, and Romer, L.JJ.), on June 30, 1900.

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## JOHNSON *v.* ADSHEAD.

109 *Law Times*, 40.

*Enforcing Memorandum—Committal Order.*—SCHED. II. 8.

A committal order on a judgment summons can be made in order to enforce an award.

AT the Rochdale County Court, his Honour JUDGE BRADBURY delivered an important judgment on an adjourned application for a judgment summons for arrears due on an award under the Workmen's Compensation Act.

The judgment summons was applied for by Andrew Johnson, 9, Heath Street, who suffered injury while working at James Thomas Adshead's Stoneyfield Saw Mills last September, and was in March last awarded 8*s.* per week under the Workmen's Compensation Act. It was stated that immediately after the order was made Adshead sold up his stock, and since then he had made a composition to his creditors. He had, however, made no payments to Johnson.

HIS HONOUR, in delivering judgment, said he had carefully considered the point raised, and had made up his mind that the judgment summons ought to be issued. It was a very important matter, the question being whether a workman could enforce an order made under the Workmen's Compensation Act by means of a judgment summons and an order to commit the employer to prison for nonpayment of the amount

due on the award. So far as he had seen there had been no decision on the point either in the County Court or the High Court, though the question had come up in a number of districts. The question was of general importance, because if a servant could not enforce his order by judgment summons, and imprisonment if necessary, he would in many cases be left without any remedy. The matter turned first of all on para. 8 of sched. II. of the Workmen's Compensation Act. That paragraph provided that an award registered in the court, or a memorandum of agreement, which amounted to an award, "shall for all purposes be enforceable as a County Court judgment. What the Court had to consider was what were the modes in which County Court judgments could be enforced. There were many ways of enforcing such judgments, among them being undoubtedly the power of proceeding under an order of the court by way of committal on the nonpayment of the debt. Sec. 5 of the Debtors Act pointed out the procedure in regard to committal—that if a judgment was obtained in any court, including of course the County Court, a person who did not comply with the judgment could be committed to prison or a period not exceeding six weeks or until he paid. This was one mode of enforcing judgment. Anybody who knew anything about County Court procedure knew, he supposed, that nineteen out of twenty judgments obtained in the County Court were enforced by judgment summons. Under these provisions it seemed to him that the matter was decided; it was to be enforced as a County Court judgment, and a County Court judgment could be, and was, enforced by committal to prison. He had therefore come to the conclusion that the judgment summons applied for could issue. He thought the difficulty in the matter had arisen owing to the fact that under the rules and forms provided in the Workmen's Compensation Act there was no form, and there was no rule which dealt with procedure by judgment summons. Rule 49 dealt with execution as a mode of enforcing an award under the Compensation Act, and there was a form given for execution; but there was nothing said in the

rules or forms about enforcing an award by means of a judgment summons. That, however, could not, in his opinion, cut down the absolute provision of the Act, which said it could be enforced as a County Court judgment. He thought it was clear that a judgment summons could issue, and he directed that it should be issued.

In *Bailey* v. *Plant* (*post*), the opposite conclusion was arrived at.

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## BAILEY *v.* PLANT.

109 *Law Times*, 254.

*Enforcing Memorandum—Committal Order.*—SCHED. II. 8.

A committal order on a judgment summons cannot be made in order to enforce an award.

His Honour JUDGE YATE-LEE gave judgment in this case in the Crewe County Court.

*R. P. Edleston*, solicitor, for the plaintiff.

HIS HONOUR: In this case a question arose under the Workmen's Compensation Act, and a long adjournment was taken to enable the applicant's solicitor to search for authority in support of his contention. The facts are these: The applicant, who was a boy employed by the respondent, a mineral water manufacturer, met with an accident whilst at his work. Compensation was assessed pursuant to the Workmen's Compensation Act by an arbitrator, whom I appointed under the authority of the Lord Chancellor. The arbitrator made his award on January 13, 1899, directing one payment forthwith, and also 2*s.* 6*d.* per week during the total or partial incapacity of the boy for work, or until further order. The incapacity continues. The respondent has made some payments under this award, but on February 12 last he was in arrear for eighteen weeks,

making £2 5*s.* due. He has retired from business since the accident took place, and it is said that he has made a deed of gift of his property, and has not now anything which can be reached by the applicant by means of an execution. However that may be, a judgment summons was taken out on February 12 last, in the name of the boy, by his father, as next friend, calling upon the respondent to show cause why he should not be committed to prison for his default in payment of this £2 5*s.* I am satisfied by the evidence, that the respondent has had ample means to pay this £2 5*s.* since it became due, and that he has refused or neglected to pay it; and, if this application were founded upon an ordinary judgment of the court, I should make an order to commit. The question is whether, under these circumstances, I have power to commit. Sec. 5 of the Debtors Act, 1869, would authorize me to do so, if the £2 5*s.* is due in pursuance of any order or judgment of this or any other competent court. I am clear, however, that it is not. The award, in my opinion, is not an order or judgment of any court. The arbitrator was a barrister, sitting merely as arbitrator, and nothing more. If authority is required, it is supplied by *Mountain* v. *Parr* (1899) 1 W. C. C. 110. It was argued, however, that, under para. 8 of sched. II. to the Workmen's Compensation Act, this award was enforceable as a County Court judgment. But I think that is not accurate. There are two classes of arbitrations under this Act: First, there are arbitrations which are quasi-public, and come before the judge, or an arbitrator appointed by him, and which, under para. 10 of sched. II., are part of the duties of the County Court, and in respect of which three forms of award are provided in Form 14 annexed to the rules. Secondly, there are arbitrations which are quasi-private, and come before a committee, or an arbitrator agreed on by the parties, and a memorandum of the result of which is to be recorded by the court, in a special register provided for by Rule 65, and with regard to the procedure on which Forms 16–19 are provided. Para. 8 of sched. II. relates only to the second class; and therefore, in

my opinion, does not apply to the present case, which comes within the first class. Reference was also made to Rule 26, providing that an award of the judge should be enforceable in the same manner as a judgment or order of the court; and it was pointed out that, under para. 3 of sched. II., the arbitrator, in the present case, had all the powers of the judge. But the liberty of the subject is concerned; and it seems to me that, to justify imprisonment under a statute, the language of that statute must be clear and explicit, and that the jurisdiction to commit could not be conferred by a rule. It is remarkable also that, by another rule (Rule 49 referring to Form 23), an express power is given to issue execution against the goods of a party in default, but nothing is said as to commitment. Rule 47 (*e*) is also framed on the same lines. There is, moreover, a broader ground which seems to me to be an answer to both these arguments. At most, it is only urged that the Act and rules provide that the award may be enforced in the same manner as a County Court judgment. But an application under sec. 5 of the Debtors Act is not, in my opinion, properly described as a mode of enforcing a judgment. No doubt, the result of such an application is, in most cases in the County Court, that the judgment is complied with. But the application is, in terms and in substance, to punish a contumacious debtor who is shown to have, or (as in this case) to have had, the means to pay; and the fact that he is allowed, by the express words of the statute, to purge his contumacy, by paying the money, does not prevent the order (if made) being a punishment for an offence already committed. The committal order is not an imprisonment for debt, but an imprisonment for past dishonesty, coupled with the chance of the creditor being paid. It may be made against a man who is penniless, and from whom nothing can by any possibility be obtained, at the time of the order; and even if made against a man then having means, nothing can be obtained from him by virtue of the order, unless he chooses to pay—it is optional with him to go to prison instead of paying; and debtors sometimes do so

if the amount is large and the term of imprisonment short, and if they have not any property against which execution can be levied. I think, therefore, that a committal order, under sec. 5 of the Debtors Act, cannot properly be described as a mode of enforcing a judgment. It is an order which may, and often does, result in a judgment being enforced, but which leaves the debtor at liberty to refuse to comply with the judgment, if he prefers to go to prison. This, I think, agrees with the decisions on the Debtors Act. More than twenty years ago, Sir George Jessel decided in *Marris* v. *Ingram* (41 L. T. Rep. 613; 13 Ch. Div. 338) that the Act was intended for the punishment of dishonest debtors, and is in that sense vindictive. The same principle was enunciated by the House of Lords in *Stonor* v. *Fowle* (58 L. T. Rep. 1; 13 App. Cas. 24, 28). Both these cases show that the committal order may be made, wholly without reference to whether it will help the creditor to obtain any money. In *Mitchell* v. *Simpson* (23 Q. B. D. 373) a divisional court held that a judgment debtor, arrested under sec. 5 of the Debtors Act, was not a person arrested by virtue of an attachment for debt, within the meaning of the Sheriffs Act, 1887; and one of the judges dissented from *Re Ryley* (15 Q. B. D. 329), where it had been said that such an arrest was merely a method of enforcing a debt. *Mitchell* v. *Simpson* was affirmed on appeal (63 L. T. Rep. 405; 25 Q. B. D. 183). Again, in *Re Watson* (67 L. T. Rep. 519; (1893) 1 Q. B. 21), all the judges in the Court of Appeal agreed that the power of committing a debtor, under sec. 5, is not execution. On all these grounds, it appears to me (and I say it with regret) that I have not jurisdiction to commit this respondent to prison, and the application must be refused. If I am right, this adds another to the list of difficulties under the Workmen's Compensation Act, which are due to the substitution of a special form of arbitration—not even assisted by the Arbitration Act—for the ordinary procedure of the court. The result in the present case is so serious for the applicant who has been injured for life, and the particular point is

likely to become of so much importance as years go on (especially after the contemplated extension of the Act to one and a half millions of agricultural labourers, where the employer may often be a man in very poor circumstances), that I am sorry to be told that the applicant's father has not sufficient means to carry this case to the Court of Appeal, where possibly, after more elaborate argument, a different result might be arrived at. Feeling, however, that my decision was not likely to be reviewed, I have looked up all the authorities on the subject which I could discover, and made a special examination of the Act and rules; and I have explained my views in a somewhat longer and more intricate judgment than I might otherwise have thought necessary.

An appeal against this decision is now pending.

In *Johnson* v. *Adshead* (*ante*, p. 158) the opposite conclusion was arrived at.

# APPENDIX.

## THE WORKMEN'S COMPENSATION ACT, 1897.

(60 & 61 Vict. c. 37.)

AN Act to amend the law with respect to Compensation to Workmen for accidental injuries suffered in the course of their employment. [6th August, 1897.]

A.D. 1897.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Liability of certain employers to workmen for injuries.

1. (1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of this Act.

(2) Provided that—

(*a*) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed;

(*b*) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid;

(*c*) If it is proved that the injury to a workman is attributable

A.D. 1897.

to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

(4) If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this subsection, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(5) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act.

Time for taking proceedings.

**2.** (1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case

of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause. A.D. 1897.

(2) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

Contracting out.

**3.** (1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependents than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

A.D. 1897.

(2) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependents as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the registrar under this Act.

Sub-contracting.

4. Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

Provided that the undertakers shall be entitled to be indemnified

by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

Compensation to workmen in case of bankruptcy of employer.

**5.** (1) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2) In the application of this section to Scotland, the words "have a first charge upon" shall mean "be preferentially entitled to."

Recovery of damages from stranger.

**6.** Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person.

Application of Act and definitions.

**7.** (1) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

A.D. 1897.

(2) In this Act—

36 & 37 Vict. c. 48.
59 & 60 Vict. c. 48.

"Railway" means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railway Act, 1896; and "railway" and "railway company" have the same meaning as in the said Acts of 1873 and 1896:

58 & 59 Vict. c. 37.

"Factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provisions of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power:

50 & 51 Vict. c. 58.
35 & 36 Vict. c. 77.

"Mine" means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies:

57 & 58 Vict. c. 42.

"Quarry" means a quarry under the Quarries Act, 1894:

"Engineering work" means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used:

"Undertakers" in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition:

"Employer" includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer:

"Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to

his dependents, or other person to whom compensation is payable:

"Dependents" means—

(*a*) in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and

9 & 10 Vict. c. 93.

(*b*) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

Application to workmen in employment of Crown.

**8.** (1) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

50 & 51 Vict. c. 67.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section 1 of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act.

Provision as to existing contracts.

**9.** Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Commencement of Act and short title.

**10.** (1) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(2) This Act may be cited as the Workmen's Compensation Act, 1897.

A.D. 1897.

Sections 1, 5.

# SCHEDULES.

## FIRST SCHEDULE.

### Scale and Conditions of Compensation.

*Scale.*

(1) The amount of compensation under this Act shall be—

(*a*) where death results from the injury—

(i.) if the workman leaves any dependents wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer.

(ii.) if the workman does not leave any such dependents, but leaves any dependents in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependents; and

(iii.) if he leaves no dependents, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;

(*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he

may receive from the employer in respect of his injury during the period of his incapacity.

(3) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependents, or, if he leaves no dependents, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependents or other person entitled thereto under this Act.

(5) Any question as to who is a dependent, or as to the amount payable to each dependent, shall, in default of agreement, be settled by arbitration under this Act.

(6) The sum allotted as compensation to a dependent may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or by the judge of the county court.

(10) Any person deriving any benefit from any moneys invested in a Post Office Savings Bank under the provisions of this Act may, nevertheless, open an account in a Post Office Savings Bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an

A.D. 1897.

examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(13) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

(15) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first sub-section of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

59 & 60 Vict. c. 25.

(16) In the application of this schedule to Scotland, the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

40 & 41 Vict. c. 56.

(17) In the Application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

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Section 1.

## SECOND SCHEDULE.

### Arbitration.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration :—

(1) If any committee, representative of an employer and his workmen,

exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided. A.D. 1897.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

(4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court. 52 & 53 Vict. c. 49.

(5) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7) In the case of the death or refusal or inability to act of an arbitrator, a Judge of the High Court at Chambers may, on the application of any party, appoint a new arbitrator.

(8) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special

A.D. 1897.

register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9) Where any matter under this Act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorizes rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

51 & 52 Vict. c. 43.

(11) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14) In the application of this schedule to Scotland—

(*a*) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court":

(*b*) Any award or agreement as to compensation under this Act may

be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral: A.D. 1897.

(c) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such cases may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced. 39 & 40 Vict. c. 70.

(15) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

# INDEX.

ABOUT. *See* ON, IN, OR ABOUT.

ACCIDENT,
meaning of, 1, 5, 7, 10

AGREEMENT,
may be implied, 138

AMOUNT OF COMPENSATION. *See* COMPENSATION.

ANCILLARY OR INCIDENTAL,
railway company rebuilding station, 47

APPLICANT FOR ARBITRATION,
employer may be, 29

ARBITRATION,
employer may initiate, 29
*See* REQUEST FOR.

ARISING OUT OF AND IN THE COURSE OF
boy pulling lever of railway points, 12
miner leaving mine by wrong way, 15
being carried to work by railway, 19
going home by train, 22
obeying order of superior, 149
relieving nature, 152

AVERAGE WEEKLY EARNINGS,
at least two weeks, 101, 104
break in employment, 123, 126

AWARD, ENFORCEMENT OF. *See* COMMITTAL ORDER.

BUILDING,
separate erections, communication between, 65
not constructed till scaffolding removed, 66
several undertakers, 91
substantial part of construction, 91, 96, 99

CASUAL LABOUR,
when employment continues, 126

CLAIM FOR COMPENSATION,
meaning of, 25, 29
out of time, waiver by employer, 36, 40

COMMITTAL ORDER,
jurisdiction to make, 158, 160

COMPENSATION,
amount of, discretion of arbitrator, 116, 118, 153
where man earning wages, 116, 153
effect of sched. I. 2 ... 118
when payable to registrar, 135

CONSTRUCTION OF BUILDING,
scaffolding not taken down, 66
several may undertake, 91, 96
substantial part of, meaning of, 91, 96, 99

COSTS,
taxation of; lump sum, 145

DEPENDENT,
meaning of, 108

DISCRETION OF ARBITRATOR,
amount of compensation, 116, 118, 153

DOCK,
loading ship from lighter, 80

EMPLOYMENT,
nature of particular work, 91
length of, 101, 104
break in, 123, 126

ENFORCING AWARD. *See* COMMITTAL ORDER.

FACTORY,
machinery used for unloading ship, 53
must be that of employer, 61
railway belonging to mine, meaning of, 84

INCAPACITY,
neglect of medical advice, 121

JUDGMENT SUMMONS. *See* COMMITTAL ORDER.

LUMP SUM. *See* REDEMPTION OF WEEKLY PAYMENTS.

MACHINERY,
used for unloading ship, 53

MEDICAL EXAMINATION,
right to, unconditional, 130
where no notice of accident, 130

MINE,
railway belonging to, meaning of, 84

NEW TRIAL. *See* RE-HEARING.

NOTICE OF ACCIDENT,
may be waived under sched. I. 3 ... 130

ON, IN, OR ABOUT,
railway running from pit's mouth, 22, 84
railway refreshment room, 51
machinery; work in hold of ship in dock, 53
carting water to mortar-mill, 55

PARTICULAR WORK,
of workman, 91

PART OF OR PROCESS IN. *See* ANCILLARY.

PAYMENT,
to Registrar of County Court, 135

PERIOD OF EMPLOYMENT,
two weeks, 101, 104
break in, 123, 126

QUAY,
meaning of, 77

RAILWAY,
belonging to a mine, meaning of, 84

REDEMPTION OF WEEKLY PAYMENTS,
measure of lump sum for, 156

REFRESHMENT-ROOM, RAILWAY. *See* ON, IN, OR ABOUT.

REGISTRAR OF COUNTY COURT,
payment to, 135

RE-HEARING,
not by way of review, 141

REQUEST FOR ARBITRATION,
service out of jurisdiction, 43

REVIEW,
may be by parties, 138
may be implied, 138
only upon fresh facts, 141

SCAFFOLDING,
not taken down, 66
trestles and boards, 69

SERIOUS AND WILFUL MISCONDUCT,
miner leaving mine by wrong way, 15

SERVICE,
of request for arbitration out of jurisdiction, 43

SHIP IN DOCK,
unloading by machinery, 53

SHIP-BUILDING YARD,
meaning of, 112

STATION, RAILWAY,
rebuilding, 47

SUB-CONTRACTOR,
not within Act, 87
not liable to indemnify, 44

TAXATION OF COSTS,
when not necessary, 145

THEREFROM OR THERETO,
loading ship in dock from lighter, 80

THIRTY FEET IN HEIGHT,
separate erections of different heights, 65

UNDERTAKER,
only liable if employer, 24
not include sub-contractor, 87
of building, may be more than one, 91

WAREHOUSE,
meaning of, 77

WEEKLY PAYMENTS,
review by parties, 138

WHARF,
meaning of, 77
timber-yard 150 yards from water's edge, 77

THE END.

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# PREFACE.

THE series for 1900–1901 will be more valuable than those preceding it, because the proprietors of "The Law Times" have been good enough to allow me to reproduce "The Law Times Reports." The present volume consists principally of cases from those Reports, "The Times Law Reports," "The Law Times," and "The Times." At the head of each case the authority is mentioned.

The House of Lords, in overruling some leading cases, has effected the principles on which others were founded. Annotation is the province of the author, not of the reporter, I must therefore leave the discussion of those cases for the next edition of "Accidents to Workmen," which I hope shortly to publish.

THE EDITOR.

THE TEMPLE,
*October* 24, 1901.

# TABLE OF CASES.


PAGE

ABRAHAMS, Harwood *v.* . . . 205
Andrew Knowles & Sons, Ltd., Lysons *v.* . . . . . 1
Argus Printing Co., Ltd., Hathaway *v.* . . . . . 177
Ashington Coal Co., Ltd., Thompson *v.* . . . . . 21
Astley & Tyldesley Collieries Co., Ltd., Peers *v.* . . . . 185

BAGLEY & Wright and Whittaker & Sons, Wrigley *v.* . . 61
Bailey *v.* Plant . . . 207, 209
Baker, Perry *v.* . . . . . 29
Bannister & Co., Carrington *v.* 146
Barrow Brothers, Bowden *v.* 215
Bowden *v.* Barrow Brothers . 215
Busby *v.* Richardson . . . 54

CARRINGTON *v.* Bannister & Co. 146
Clark, Owen *v.* . . . . . 170
Clements, Perry *v.* . . . . . 56
Conway, Dredge *v.* . . . . . 104
Cosgrove *v.* Partington . . 167
Cubitt, Knight *v.* . . . . . 71

DREDGE *v.* Conway . . . . 104

EVANS, O'Donnell, & Co., Fullick *v.* . . . . . 164

FAULDS, Simmons *v.* . . . . 169
Ferguson *v.* Green . . . . 113
Fish, Tench *v.* . . . . . 140
Fitzpatrick *v.* Hindley Field Colliery Co. . . . . 37
Fullick *v.* Evans, O'Donnell, & Co. . . . . 164

GRAHAM, Law *v.* . . . . . 131
Great Central Ry. Co., Hanson *v.* . . . . . 152
Great Central Ry. Co., Jones *v.* 50
Greaves *v.* Mulliners . . . 189
Green, Ferguson *v.* . . . . . 113
Greenwood, Roper *v.* . . . . 23

HANSON *v.* Great Central Ry. Co. . . . . 152
Harwood *v.* Abrahams . . . 205
Hathaway *v.* Argus Printing Co., Ltd. . . . . 177
Hindley Field Colliery Co., Fitzpatrick *v.* . . . . . 37
Hoddinott *v.* Newton, Chambers, & Co. . . . . 74
Hollinshead, Nash *v.* . . . . 125
Houghton *v.* Sutton Heath and Lea Green Collieries Co., Ltd. 173

JOBSON & Co., Raine *v.* . . . 135
Jones *v.* Great Central Ry. Co. 50
Jones *v.* London & South Western Ry. Co. . . . . 46

KNIGHT *v.* Cubitt . . . . . 71

LAW *v.* Graham . . . . . 131

in the other affirmed that of the judge of the Liverpool County Court.

The cases are reported in (1900) 2 W. C. C. 101; 2 W. C. C. 104.

In *Lysons* v. *Andrew Knowles & Sons* the respondents were colliery proprietors carrying on the Pendlebury Collieries, Lancashire, and the appellant was a collier. He entered the service of the respondents as a day labourer, or piece-worker, at the daily wage of 6*s*., and went down into the pit. The first day of his employment was July 18, 1899. On the following day the pit was closed, but on the 20th he again went down on the same terms, and was injured. For each day he received 6*s*. The case went to the arbitration of the County Court Judge, who awarded him compensation at the rate of 6*s*. a day during disablement. This decision was reversed in the Court of Appeal, the respondents contending that the appellant, having worked only for two days, was not entitled to compensation, as it was necessary for an applicant to work for two weeks in the same employment before his "average weekly earnings" could be arrived at.

In *Stuart* v. *Nixon & Bruce* the appellant was the widow and administratrix of William John Stuart, who was killed on September 15, 1899, at Hornby Dock, Liverpool, whilst engaged in fixing cross-bars over the hatchways on the steamship *Lake Superior*. He was a casual labourer, and had only been continuously employed by the respondents, who were stevedores engaged in loading the ship, for four days before the accident. The same question as in the other appeal thus arose of "average weekly earnings." It was also contended for the respondents that he was not employed in or about a factory or dock as required by the Act; that the respondents were not "undertakers," and that the machinery, not being used for loading or unloading, was not machinery or plant in the sense of the Act. The appellant claimed on the basis that his average earnings were 35*s*. a week.

The County Court Judge held that the case was governed by the decision of the Court of Appeal in *Lysons* v. *Knowles*.

As the appeals raised substantially the same point, they were argued together.

In the first appeal *J. Walton*, Q.C., *Atherley Jones*, Q.C., and *R. Smith* appeared for the appellant.

*Cripps*, Q.C., and *F. H. Mellor* for the respondents.

In the second appeal *J. Walton*, Q.C., and *Leslie Scott* appeared for the appellant.

*Ruegg*, Q.C., and *A. G. Steel* for the respondents.

In the course of the arguments *Hennessey* v. *McCabe* ([1900] 2 W. C. C. 80), *Medd* v. *McIver* ([1899] 1 W. C. C. 76), and *Durrie* v. *Warren* (*Ibid.* 72) were cited.

At the conclusion of the arguments their Lordships gave judgment as follows :—

The Lord Chancellor (Halsbury): My Lords. In these cases I think it impossible not to recognize the fact that the Act of Parliament which your Lordships are called upon to construe is one which from time to time presents difficulties of construction. I am not surprised at the fact that the Legislature, having a somewhat difficult problem to solve, has used language which requires consideration to give it its true signification. From time to time in the course of manufacturing this Act of Parliament difficulties were met with which it was sought to solve by the use of words not perhaps the best chosen, which have raised some difficulties in the construction of the Act. The broad proposition, of course, was that the Legislature intended that compensation should be given to every workman in certain trades when an injury happened to him in the course of his employment, subject to certain exceptions which are not relevant to the question now under debate. The language in which the right was given must be looked at, I think, with care to see whether it was, as appears in the first instance, intended in its universality or was intended to be cut down, as is contended, to a very limited right by

sections or phrases in the schedule. Certainly, whatever other difficulty there may be in construing the language as it stands, it would be, I think, more difficult still if we were to introduce these qualifications upon the right. Now, in the view which I suggest to your Lordships, I think that the language is simple enough, and if one looks at what I may call the framework of the legislation which is intended to be applied, I think that there is not so much difficulty as has been contended with regard to this particular provision. The language is this: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." That I regard as the affirmative or leading enactment. What follows appears to me to be equivalent to a statement that the mode in which that compensation is to be ascertained and determined is to be according to the method and manner provided for in the schedule. The language itself (I do not want to undervalue the argument) is "liable to pay compensation in accordance with the first schedule to this Act." The first thing, I think, that one has to do is to apply one's mind to what is the substantive intention and meaning of this Statute. Does it mean that every workman, who is employed in one of the prescribed trades, shall be (subject to certain conditions not relevant to the matter now under debate) entitled to compensation? Or does it mean that only workmen shall be entitled to compensation in respect of whom it is possible to say that the periods of their employment and the mode in which they are paid will render it possible to establish an average weekly payment, so that anybody who comes outside that category is not entitled to any compensation at all? For my own part, I cannot entertain a doubt that the Legislature did mean that every workman in the prescribed trades should be entitled to compensation, and I think that the language is that which one would naturally expect to

have been used by the Legislature if that was the meaning of the enactment. But now it is said that the language of the enactment is that he is to "be liable to pay compensation in accordance with the first schedule to this Act." It is to be observed that even upon that contention it is not such compensation as is enacted in the schedule, but "in accordance with the first schedule to this Act"; and when we look at the 1st schedule to the Act we find there a variety of provisions which are very intelligible indeed if we take what I say is the leading enactment—that every workman is entitled to compensation. But it is said: If a workman is not employed for at least two weeks, how can you average his earnings or agree his earnings by an "average" which, when you have only got one term, is an impossible phrase. Well, for my own part, if I came to the conclusion that there was no mode by which the *quantum* could be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down or override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the *quantum* was to be. And I think, if one looks at the whole framework of the schedule, it is intelligible enough why those modes of calculation were adopted. In the first place, it will be remembered that no compensation is due to any one unless he is disabled for a period of two weeks, the intention thereby being to exclude all trifling injuries. In the next place, assuming that the person is entitled to compensation during the period in which he is unable to work and support himself, the Legislature obviously had in its mind this—that the man was not to be left without provision during such period as he was

laid up by reason of the accident; and they enacted that payment—it is described as a "weekly payment"—should be given to him. Then I suppose it occurred to everybody who was dealing with the mode in which the Act was to be administered, and considering how the relief was to be given, that you must in some way or another find out what was to be the weekly payment if it had relation to his earnings or wages. It was obvious, I should think, to any one, that everybody is not paid by the week—that you cannot have the exact thing made ready to your hand to enable you to find out how much the weekly payment is to be. You must split up that which is what I call the aggregate payment, whether it is by the year, or the month, or what not, into such proportions in relation to his weekly earnings that the week's payment, or rather, as it was described, the payment in respect of the week, should be arrived at. How was that to be done? It seems to me that the Legislature, in using the phrase that you must take the average of the earnings for the week, did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in the arithmetic he was not to get it at all; but it provided an artificial means of finding out what that *quantum* was to be, and that was no doubt by the use of the word "average." I do not myself feel very much impressed by the discussion that we have had as to what the word "average" strictly means. I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think that it was in that popular sense, taking one day with another or one week with another, that the Legislature used those words, and I think that it is what everybody would understand by "average" that his earnings were so much—not his agreed earnings by contract; there it would be definite—

that if a man was only employed at irregular intervals or at irregular amounts, you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid. That seems to me to account for the language in which the Legislature has couched its enactment. The alternative is this: that you are to suppose that the Statute, giving a right in the language which I have read, intended to exclude the enormous class of day labourers and persons not in regular employment, but only irregularly employed from time to time, unless you could strike the average of a fortnight's employment. Now, looking at the language of the Statute and the mode in which what may be described as the initial right is given, I should shrink very much from such a construction, and I am unable to concur with the Court of Appeal. The Court of Appeal undoubtedly does say in words that they can give no account or reason why the Statute should be so construed; and that seems to me to be rather an admitted weakness in a construction when you are construing a Statute, that you are compelled to say: I so construe it, but why, I am wholly unable to conjecture. It appears to me that there is a very reasonable ground upon which you should adopt the construction which I have suggested to your Lordships; and if that is so, the first case with which your Lordships are dealing should be decided in favour of the plaintiff, reversing the order of the Court of Appeal. The next case (*Stuart* v. *Nixon & Bruce*) raises a point which is peculiarly its own. In so far as it touches the question with which I have now dealt, it is disposed of by what I have already said. If I understand the facts (and it is not at all immaterial to consider what the exact facts found or intended to be found by the County Court Judge are), the fact is that the stevedore was engaged in loading this vessel—I will not say that the loading was incomplete, because that would be assuming the question with which I propose to deal, but all the cargo was stowed in. The beams, which

form an essential part of the vessel, and the hatchways, which are to preserve both the safety of the vessel and the safety of the cargo, had not been put in, and in the course of the operation of putting those beams in, which form part of the necessary support of the hatchways, the person who was engaged in that operation, whose widow is suing here, was killed. He was engaged in the operation which I have described. Now, first of all, was he engaged in the action of "loading"? I should think that very few people would describe the work which he was then doing as anything else. It is true that at that particular moment he was engaged in putting in their place the beams which formed part of the covering of the vessel, and not actual parts of the cargo which was being carried. I will deal presently with the other words upon which one of your Lordships, I am afraid, entertains some doubt; but so far as the word "loading" is concerned, can any one doubt that the whole operation was intended to be included within the words of the enactment? I should have thought it impossible to doubt it. Nor do I entertain any difficulty about the stevedore being the person who was doing it. I could quite understand that if the crew were engaged in doing it, it could be said that, although the joint action of the stevedore and the crew was "loading," yet the stevedore was not loading, but the crew were, in respect of this particular matter. First of all, as regards the thing done, can it be reasonably contended that the putting in of the hatchway and completing the safety of the vessel and the safety of the cargo by this means was not a loading of the vessel? Would anybody say that if the stevedore had undertaken to completely load such and such a vessel, and had left the hatches off and not put the beams in for the purpose of receiving the hatchways, he had completed his contract? It may be the same question, perhaps, but only a different form of putting it. I myself entertain no doubt that it is part of the duty of the person loading the vessel to put on the hatchways just

as much as to put in the bags in any particular part of the hold. But then comes this question: By a very singular application of the fashion of legislation by reference, the Legislature has made the use of certain machinery for loading or unloading to or from a wharf, etc., not machinery of a factory, but it has made it by Statute a "factory" itself, and the person using the machinery is to be the person in control of the factory so as to establish the legal liability. I admit that the statement of that legislation is somewhat grotesque, but that is what the Legislature has done. The County Court Judge not unnaturally shrank from adopting it, but I am afraid that neither a County Court Judge nor your Lordships' House have any right to criticise it. We must administer the law as it is, and if the Legislature has thought proper to make machinery so used a "factory," your Lordships must assume it to be a factory for the purpose of any decision at which your Lordships can arrive. Then there arises another and a more subtle point upon which one of your Lordships, I think, entertains some doubt. The language of the Statute is that the person so engaged must be either loading or unloading to or from a wharf. Now, the criticism, as I understand it, is this—that at the particular moment when this accident happened there was no operation that could properly be described as loading or unloading to or from a wharf. All the bags were in, and the only thing that remained to be done was that which I have described; and therefore the particular machinery which, only while used in loading or unloading to or from a wharf, becomes a "factory" with all the consequences incident thereto, was not at that moment a factory. That was the argument. But, to my mind, that is putting far too narrow a construction upon the words of a Statute which was passed before the Workmen's Compensation Act, and was intended to be a protection to the workmen in peculiarly dangerous operations. Amongst other things, one operation which the Legislature thought it right to protect was the operation

of loading or unloading to or from a wharf. With respect to the other parts of this transaction no question is raised as to the Act applying; but the words "to or from a wharf" are suggested as excluding the particular moment when this transaction took place. Taking a broad view of that question, I should have thought it impossible to suppose that the Legislature intended to confine the protection of workmen to the exact moment when a bag was being either lowered from or to a wharf. Surely what they intended to protect the workmen from was the danger of an operation, in the ordinary course of such transactions, when something is being done; not limited to the exact moment, but, speaking of the whole transaction—when the transaction is being effected of loading or unloading from a vessel to a wharf. Various points have been put in the course of the argument, and it has been, I think with great force, argued, Does anybody suppose that it is only while the machinery has actually a bag in its clutches that the Act applies? When it is swinging back again itself empty, or when it is descending into the hold to get a bag, although there is not a bag attached to it, is not that loading or unloading? Literally it is not; and if the same criticism is to be applied, each of these transactions must be held to be outside the Act of Parliament, because at that moment no bag was either being loaded or unloaded. I cannot think that the proper way to construe a Statute passed with that object in such language. The loading or unloading must be treated as a whole transaction, as men in business in ordinary life would regard it. How was the man employed? He was employed in loading or unloading the vessel, although at the particular moment he may have been standing still and doing nothing. I think the words "loading to or from a wharf" are satisfied by the fact that the men were engaged in this transaction—I was going to say that it was ancillary to the main transaction of loading or unloading, but that, I think, would be an inadequate statement of it, because I think it part of

the loading and unloading. It is part of the operations which the human labourer is engaged in, in doing the very thing the Legislature contemplated as requiring this protection, and, therefore, I think that this point also fails, and that the plaintiff is entitled to judgment. For these reasons I move that in both these cases your Lordships should reverse the decision of the court below.

LORD MACNAGHTEN: My Lords. I am of the same opinion in both cases. In the second case (*Stuart* v. *Nixon & Bruce*), as regards the question whether the workman who was killed was engaged in an employment to which the Act applies, I have only to say that I have no doubt that he was. He was employed in the process of loading from a wharf, and employed about machinery used for or in relation to that process. In my opinion, the operation in which he was engaged at the time was part of the process, and the process was not complete until that operation was finished. As regards the more substantial question at issue, I must say that I do not feel pressed by the difficulty which presented itself to the Court of Appeal. In the first place, it is important to bear in mind that the right to compensation is given by the Act, not by the schedule. The conditions which must have been fulfilled in order to support a claim to compensation are to be found in the Act itself. The Court of Appeal has added another condition which is not contained in the Act, and is not expressed in the schedule, but it is said that it may be discovered there. The right to compensation, as I said, is given by the Act, but the compensation is to be "in accordance with" the schedule. The words are not "as defined by the schedule," or "in the terms prescribed by the schedule," but "in accordance with the schedule." Those words, as it seems to me, import a certain latitude. The degree of latitude—if I may borrow the language of the Lord Chancellor when discussing the same words in the Bills of Sale Act in *Thomas* v. *Kelly* (60 L. T. R. 114; 13 App. Cas. 506)—

it would be difficult if not impossible to define. But there is no such great difficulty in dealing with them in a concrete case. At least, they seem to convey a warning or an intimation that you are not to cling so closely to the letter as to defeat the declared purpose and object of the Act. I have no doubt that if Parliament had intended to impose the condition which has been discovered in the schedule, the condition would have been inserted in the Act. But it would have been a most extraordinary thing if such a condition had been imposed. In the case of a workman working at a dangerous trade, I suppose that the periods of the greatest danger are—first, the period at the commencement of his employment, before he is familiar with his work; and, secondly, the period when he becomes so familiar with it as to be careless of danger. But of the two I suppose the commencement to be the more dangerous. Now I cannot imagine that Parliament, when it was giving this boon to workmen, would have thought of saying that no compensation should be paid if the accident happens during the most dangerous period of the workman's employment. Still less can I suppose that Parliament would have left such a condition to be inferred from a single word in the schedule, and that word (to say the least) not used with perfect accuracy. Turning now to the schedule, there are, I think, three things to be noticed. In the first place, I agree with Mr. Walton that where death results from the injury, and the workman has left dependants, the compensation must be at least £150. It is to be £150, or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident, not exceeding in any case £300. But if the workman has not served the full period of three years, and you cannot find a basis on which to calculate the hypothetical amount, the workman would, I think, still be entitled to the £150. In the next place, it is quite clear that the word "average," which has given rise to all this difficulty, is not used

accurately. If the rule which the Court of Appeal has laid down were applied strictly, it seems to me that a workman who had served for a year at an unvarying rate of wages, and had earned his wages week by week, would not be entitled to compensation at all. You may add up his wages for a year and divide by fifty-two, but you would not get an average, because there would be no variations between which you would take the mean. Lastly, the word "average," as was pointed out by Mr. Walton, and more fully by Mr. Scott, occurs in the 2nd sub-section, and it is, I think, plainly not used there in the sense attributed to it in the Court of Appeal. If this case happened—if a claim to compensation was made by a person partially incapacitated, and if at the time of the claim he had returned to work and was earning just half what he was earning before, but had only been at work for one week, you could not take those earnings into consideration, and make a set-off against the compensation claim, and that would plainly be unfair and unreasonable. All this seems to show that the word "average" is used very loosely in the schedule. The obvious meaning, I think, is, that you are to take a week's earnings as the unit of calculation; but if there has been a series of weekly earnings of different amounts you are to take an average, and the unit will then be not an actual week's earnings, but a hypothetical week's earnings. You are to take one week with another, as Lord Robertson observed. I am therefore of opinion that the judgment of the Court of Appeal must be reversed in both cases, and the claims of appellants allowed with costs.

Lord Shand: My Lords. I have no difficulty in concurring in both cases in the decision at which your Lordships have arrived. I confess that in the earlier part of the argument I felt that there was considerable force in the view which had been taken by the Court of Appeal, that one day's wages only does not, strictly speaking, give the means of striking an average, and that in a case where

there was one day's work only it was very difficult to get at the average weekly earnings in the ordinary sense, because you require several occasions at a different or, it may be, at the same rate of wages, in order to enable you to strike an average. But I am satisfied that, for the reasons which have been stated by the Lord Chancellor and Lord Macnaghten, the term "average" is used not with strict accuracy, but loosely, in this Statute. It appears to me that, as the Lord Chancellor said, if it had been intended to strike out of the Act men in the same employment under the same employer, and it may be present at the same accident, who had only worked for one day, so that there should be no compensation for them, looking at the broad terms of the Statute itself to which the Lord Chancellor has referred, it would have required a direct provision to that effect. It would not be lurking in the schedule, which merely fixes the rate of compensation to be given, that you would find an absolute exclusion of the right altogether. I go with the argument upon that point, that it would not be a matter to be taken as a mere inference, but would be found in the language of direct enactment. In the next place, it appears to me that you read the provision quite fairly when you propose to get at "the average weekly earnings" by taking that which the man has made in the week in that particular employment, which is only the wages for a particular day. On these grounds, and adopting the reasons given by the noble and learned Lords who have gone before me, I am of opinion, although I think that the question is attended with considerable difficulty, that the decision of the Court of Appeal ought to be reversed.

Lord Davey: My Lords. Your Lordships have had before you in the course of this session, and earlier, several appeals on this extraordinarily ill-drawn Act, but I do not know that your Lordships have had one of greater importance or greater difficulty than the one before you. The difficulty really arises from this—that the draftsman

has apparently not worked out on paper into legislative language the scheme which he had in his head, and it looks very much as if the Act had really been framed from notes of legislative intention, and had not been expanded into the proper legislative language. Cases which have arisen, and cases which are likely to arise, appear not to have been contemplated, but apparently were supposed to be covered by the general language used in the Act. I have made that observation, because I think that it is the key to the difficult question of construction upon which the Court of Appeal have expressed their opinion. Now I turn to the examination of the Act, and I entirely agree with what has been said by the Lord Chancellor, that you ought to construe this Act so as, as far as possible, to give effect to the primary provisions of it. In the first section I find that the employer, subject to the provisos, is made liable to pay compensation, and it goes on, "in accordance with the first schedule to this Act." I confess that I should not read those words, "in accordance with the first schedule to this Act," as being restrictive of the obligation upon the employer to pay compensation. I should not consider that those words limited or restricted the right of the workman to receive compensation, or the obligation upon the employer to pay compensation, but as being intended to denote the manner and mode in which that compensation was to be carried into effect. You may substitute for the words "in accordance with the first schedule" the actual title of the first schedule, and then the meaning which I attach to it would be perfectly clear, "in accordance with the scale and conditions of compensation contained in the first schedule"—that is to say, it is an expression of the mode and scale on which the amount of compensation, not the right to it, is to be ascertained, and of the conditions upon which, when ascertained, it is to be enjoyed. The Court of Appeal have found that those words, having regard to the construction that they put upon certain words in the schedule which have been

referred to, attach a condition, and a most material condition, to the right to compensation, namely, that no workman should be entitled to compensation unless he has been in the employment of his present employer for a period exceeding two weeks. Now, if it were intended to restrict the compensation given by the Act to workmen engaged at least two weeks by the same employer, you would expect to find it in the Act, and you would expect to find it as a qualification of the right given by the Act; you would expect to find it in some way limiting or qualifying the description of workman who is to be entitled to compensation. But you find nothing there at all, and even if I came to the conclusion that the construction put by the Court of Appeal on the schedule was the right one, I should say that this was a *casus omissus* which had been overlooked in framing the schedule, and that the right being given by the Statute there was nothing in the schedule to take away the right, and that the Court must find some other means of arriving at the amount and conditions upon which it was to be enjoyed so far as the schedule was inapplicable to the case. Now, if you turn to the schedule itself, what do you find? You find in the first place that it is intituled "Scale and Conditions of Compensation." I have referred to that. Then the first clause in the schedule is "The amount of compensation under this Act shall be," etc., and the clauses which have to be construed followed after that enactment. "The amount," your Lordships observe, "of compensation shall be" so and so. Obviously the only object of those clauses in the schedule was to fix the amount of it, and not in any way to qualify or restrict or modify the right to compensation. Then going on with the 1st schedule, it was suggested that it might come under the term "conditions," but that I construe to mean, reading it with the word "scale," the conditions of enjoyment—not the conditions upon which the right is given, but the conditions under which the right given in the body of the Act is to be

enjoyed. And I find, on looking through this schedule, numerous conditions; for example, in clauses 8 and 11 there are provisions for the workman's submitting himself for medical examination; in No. 5 the question as to who is a dependant is to be settled by arbitration; in 12 the weekly payments may be reviewed from time to time; by 13 they may be redeemed by the payment of a lump sum; and 14 provides that they shall not be capable of being assigned to any other person; so that you find the word "conditions" amply satisfied, and the character of the conditions which are intended is shown by the actual enactments contained in the schedule itself. When I come to the words which have to be construed in both these cases, I really have very little to say that has not already been said by the Lord Chancellor and Lord Macnaghten. Shortly put, I think that the draftsman intended this: He saw that in many cases the actual weekly wage would not always be of the same amount, and that therefore it was necessary in some cases, and probably in most cases, to take an average, and he has used a compendious formula or compendious expression which was intended to include the simple case, as well as the more complicated case of the actual weekly wage being of a different amount. I do not say that it is good drafting; I do not say that it is free from difficulty; but, on consideration of all the circumstances, I think that it is the proper way of construing it. The weekly earnings are to be the basis upon which the compensation is to be assessed. If you have the actual regular weekly earnings, you do not want to inquire any further; but if the weekly earnings have differed in one week with another, then you require to strike an average in the ordinary way. As has been pointed out, if the weekly earnings were uniform throughout the year, you cannot talk of the average weekly earnings of a person who has had £1 a week throughout the year; you would not say his average wages were so and so, you would say his weekly wages were so and so. So it is impossible to

attach the accurate and logical meaning of the word "average" to the enactment which you find in this schedule. Being of that opinion, I agree that the decision of the Court of Appeal should be reversed, and in one case the decision of the learned County Court Judge be restored. In the other case I do not know whether it must go back for a new arbitration, but the amount must be ascertained in some way. With regard to the case of *Stuart* v. *Nixon & Bruce*, I have only to add that I entirely agree with what has been said, that the injury to the workman was in the course of the process of loading the vessel from the quay. Notwithstanding that the actual putting of the goods into the hold had been completed, I think that this was "relating to" "the process"—in fact, I find an admission before the learned County Court Judge that the process was incomplete without the putting in of these beams. I do not place much reliance upon that, because it is obvious that the County Court Judge understood it differently from its *primâ facie* meaning; but I think the admission correct, and it is exactly the language which I should choose to adopt myself. If the two operations had been in fact severed, and the one had been done by a contractor and the other had been done by the master of the ship, that might not have been so; but where we find it done by the stevedore, I think that it was done by him as part of the process of loading the ship.

Lord Brampton concurred.

Lord Robertson: My Lords. The interpretation clause of this Act defines "workman" in language of the extremest latitude as regards the nature of the contract under which he works, and in that section and in the rest of the Act, as distinguished from the schedules, there is no hint or suggestion that it is limited to persons who have worked for any particular period prior to the accident. Sec. 1 of the Act declares the employer to be liable to pay compensation in accordance with the 1st schedule to every workman who has sustained personal injury by accident arising out of

and in the course of the employment. Having regard to the subject-matter of the schedule and its place in the scheme of the Act, it would be most surprising if the schedule should prove to contain some limitation of the class of persons benefited. Mr. Scott is, I think, quite right in saying that the "conditions" laid down in the schedule are none of them conditions precedent to the right to compensation, but are all conditions of the exercise of the right by persons assumed to possess it. Now, the basis of the respondents' contention is the words "average weekly earnings," and ultimately the single word "average," and I think it wholly insufficient to support so considerable a burden. All that the Act itself says is that every workman injured in the circumstances stated is to get compensation in accordance with the schedule, and it is completely in accordance with the schedule that the man whose weekly earnings require no arithmetical computation to reduce them to a definite standard of compensation should receive compensation according to that standard. Supposing the words had been "weekly earnings, taking one week with another," it would be far too literal to hold that because a man had only worked one week he would be excluded; and the word "average" expresses nothing more than the same idea.

Lord Lindley: My Lords. Upon the main questions which have been argued before your Lordships, I agree with everything which has been said, and in particular I agree with the construction put upon the enacting part of the Workmen's Compensation Act and upon the expression "average weekly earnings" in the schedule. To my mind, the result arrived at by the Court of Appeal, to the effect that nobody can claim compensation under this Act unless he has been in the same employment for a fortnight, is startling and untenable. With regard to the small point about the loading, I have the misfortune to be in a minority of one. But I cannot bring myself to say that the accident

which happened here was occasioned about a "factory," which means machinery loading or unloading from a wharf or quay. I do not say whether the loading or unloading was finished or not. I should say myself that it was, as the County Court Judge held; but even if it were not, the process of loading or unloading from a wharf or quay was over and finished for ever. The accident happened by the use of a crane or machine, not in completing that which was, according to my understanding of the case, at an end, but in a totally different operation, which was putting down the cross-bars over the hold of the ship with a view to place the hatchways over them. That point is a very small one, and I have no doubt, as your Lordships differ from me, that I am wrong; but as I have an opinion, I thought it right to express it.

The LORD CHANCELLOR: My Lords. In the case of *Stuart* v. *Nixon & Bruce* the County Court Judge, taking the view which he did of the law, has not assessed compensation, and therefore it must go back, because your Lordships have not the power to assess the compensation here. If it were done here consistently with the judgment it must be the sum which, according to your Lordships' construction of the Statute, is the minimum sum. But I do not think that your Lordships have jurisdiction to enter into that question. The only judgment which I can move is that the case be sent back to the County Court Judge to find out, in pursuance of your Lordships' judgment, the amount of compensation which ought to be assessed.

Judgments in both cases reversed, with costs in this House and in the courts below. In *Lysons* v. *Andrew Knowles & Sons*, order of the County Court Judge restored. In *Stuart* v. *Nixon & Bruce*, case sent back to the County Court Judge to assess the compensation.

Solicitors for the appellant Lysons, *Radford & Frankland*, for *Bowden & Widdowson*, Manchester; for the appellant Stuart, *Crowders, Vizard, & Oldham*, for *G. J. Lynskey*, Liverpool.

Solicitors for the respondents Andrew Knowles & Sons, *Rowcliffes, Rawle, & Co.*, for *Fullagar & Hulton*, Bolton; for the respondents Nixon & Bruce, *William Hurd & Son*, for *Oliver, Jones, Billson, & Co.*, Liverpool.

Also reported (1901) A. C. 79; 70 L. J. Q. B. 170; 84 L. T. R. 65; 65 J. P. 388; 17 T. L. R. 156.

From the report of *Lysons* v. *Andrew Knowles* in the Law Reports, it appears that an important point was raised but scarcely argued, and left undecided, viz. whether a week means any consecutive seven days, or from Sunday to Sunday, or as may be arranged, in any particular employment. *Conf. Bazalgette* v. *Lowe*, 24 L. J. Ch. 368, 416.

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March 12, 1901.

## THOMPSON *v.* ASHINGTON COAL COMPANY (LIMITED).

Before A. L. Smith, M.R., Collins and Romer, L.JJ.

84 *L. T. R.* 412.

*Accident.* — Sec. 1, 1.

A piece of coal finding its way under the skin of the knee of a coal-miner, who very frequently has to work on his knees, is an accident.

This was an appeal by the respondents in the County Court from a decision of the Judge of the Northumberland County Court, awarding to the applicant compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a miner who had been in the employ of the appellant company.

The deceased had been employed by the appellants in hewing coal in a 2ft. 6in. seam, and to do his work had to kneel. There was a large quantity of small coal about, and about a fortnight before his death he complained of a pain in his knee. On examination it was found that a

piece of coal had worked itself into his knee. Blood poisoning subsequently set in, and the man died.

The County Court Judge found that the piece of coal had got down the deceased's trousers while he was hewing coal, and so had worked itself into his knee. He therefore held that the injury to the deceased was caused "by accident, arising out of and in the course of the employment," within sec. 1 of the Workmen's Compensation Act, 1897, and awarded the deceased's widow £200 compensation. The appellants appealed.

*Mundahl* (*Danckwerts*, K.C., with him) for the appellants: There was no evidence that the coal got into the deceased's knee in the course of his employment. Even if it did so get in, that cannot fairly be called an "accident." There was nothing fortuitous or unexpected in that happening. The deceased knew what he was doing when he knelt down on the coal to work. It was only to be expected that the small coal would work into his knee: *Walker* v. *Lilleshall Company* (*Limited*) ([1900] 2 W. C. C. 7).

*Ruegg*, K.C., and *F. D. Blake* for the plaintiff, were not called upon.

Smith, M.R.: The question here is whether there was evidence on which the County Court Judge was justified in saying that the death of the workman was caused by accident arising out of and in the course of his employment. He was employed by the appellants in hewing coal in a 2ft. 6in. seam. From a consideration of the facts, the County Court Judge drew the inference that the death was caused by a piece of coal working in under the deceased's trousers while he was hewing coal, and he held that the injury was caused "by accident" within sec. 1 of the Workmen's Compensation Act, 1897. If any one were to kneel down in a drawing-room and a needle ran into his knee, that would clearly be an accident. It is said that that case is not like the present because it is a natural thing, when a man is working in a small seam of coal such as the deceased worked in, that a piece of coal should run

into his knee. But what happened was fortuitous and unexpected. It seems to me that the mere statement of the case is enough to show that what happened was an accident. I think the County Court Judge was right, and the appeal must be dismissed.

COLLINS, L.J.: I am of the same opinion.

ROMER, L.J.: I agree.

Appeal dismissed.

Solicitors for the applicant, *King, Wigg, & Co.*, for *Watson, Dendy, & Burton*, Newcastle-upon-Tyne.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Cooper & Goodger*, Newcastle-upon-Tyne.

Also reported 84 L. T. R. 412; 65 J. P. 356; 17 T. L. R. 345.

See other cases on this subject in Vols. I. and II. and *post*.

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November 16, 1900.

## ROPER *v.* GREENWOOD.

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 471.

*Accident—Internal Complaint—Knowledge of Risk.*—SEC. 1, 1.

A woman suffering from *prolapsus uteri* was employed to do work that necessitated her lifting boxes which she knew were too heavy for her. Notwithstanding this knowledge, she continued the work, and strained herself.

*Held* that there was no accident.

THIS was an appeal by the applicant from the award of the County Court Judge of Halifax.

The applicant was employed by the appellants in their workshop, which was a "factory" within the meaning of the Workmen's Compensation Act, 1897.

The applicant was employed as a box maker. Upon the day in question she was ordered to cover with paper twelve

wooden boxes. These boxes were larger and heavier than the boxes upon which she had previously worked. She complained that they were too heavy for her to turn and lift, but she could not obtain any assistance.

When she had completed six boxes and was lifting up another, she suddenly felt great pain, and fell down in a faint. She was taken home at once, and was disabled for a long time. The medical evidence showed that she was suffering from *prolapsus uteri.*

It was proved by the medical evidence that the injury to the applicant was the result of a strain.

The Workmen's Compensation Act, 1897 (60 & 61 Vict., c. 37) provides :

Sec. 1.—(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule of this Act.

The County Court Judge, in deciding the case, said : "In considering the effect of the Act one must dissociate the accident from the injury. Two things must concur to bring the case within the Statute. Firstly, there must be an accident ; secondly, there must be personal injury arising therefrom. In this case, that there was personal injury is an admitted fact. The question to be determined is, Did it arise from accident ? Now, in its ordinary sense, the term 'accident' means 'something which happens.' In the Act there is no definition or special meaning attached to the word or indicated, so that the word must be held to be used in its ordinary sense. In its ordinary sense the word 'accident' necessarily implies and involves violence, casualty, or *vis major*. It was argued for the applicant that the strain or unusual exertion was the 'accident' from which the injury resulted. Now, Collins, L.J., in *Hensey* v. *White* ([1900] 2 W. C. C. 1), meeting such an argument, says : 'It seems quite clear on the findings of the learned County

Court Judge that the element of accident was entirely wanting; and that, on the other hand, the diseased condition of the man's internal organs was the real cause of his death. In the ordinary course of his work he was applying more than ordinary pressure to the wheel, and it is said that the injury which he received while doing so was the result of an accident; what he was doing, however, he was doing deliberately and in the ordinary course of his work, and that which happened was in no sense a fortuitous event.' So that, in accordance with that ruling, I find (1) that there was an injury without any preceding accident, and (2) that the injury was brought about by an unusual exertion or strain, and did not arise from any accident in the course of her work."

The learned Judge accordingly made his award in favour of the respondents.

The applicant appealed.

*Macaskie* for the appellants: The County Court Judge was wrong in holding that there was not an accident from which the injury arose. The facts of this case were not in dispute, and, unless it can be held as a matter of law that these facts could not constitute an "accident" within the meaning of the Act, the applicant brings the case within the Act and is entitled to compensation. In *Hensey* v. *White* ([1900] 2 W. C. C. 1) and *Walker* v. *Lilleshall Coal Company* ([1900] 2 W. C. C. 7) it was found that the injury was entirely independent of the occurring of the event which was said to be an accident causing the injury. The present case is entirely different, because the injury was the direct result of the strain of the unusual exertion. The decisions in *Lloyd* v. *Sugg* ([1900] 2 W. C. C. 5) and *Timmins* v. *Leeds Forge Company* ([1900] 2 W. C. C. 10) are in favour of the applicant. It is clear that there was a fortuitous or unforeseen event—that is, the strain caused by the unusual exertion of work, which was heavier than usual—and therefore there was an "accident" within the meaning of the Act. The meaning of this word "accident" in the Act ought not to be

so limited and cut down as to exclude cases from the Act unnecessarily.

*Montague Lush*, for the respondents, was not called upon to argue.

A. L. SMITH, M.R.: This is an appeal from the award of the County Court Judge, who held that in this case the applicant did not come within the purview of the Workmen's Compensation Act, 1897. There can be no doubt that in order to bring the case within the Act, the applicant must prove that there was an "accident" which caused the injury. The words of sec. 1 (1) of the Act are: "If in any employment to which this Act applies injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation." I agree with the County Court Judge that he rightly directed himself as to the meaning of "accident." The facts of this case are that the applicant was employed as a box maker, and upon this occasion the boxes upon which she had to work were of a larger size than usual; every one knew that they were so. She began to work upon these boxes in the morning; she found them somewhat too heavy for her; she did not give up, but went on with the work. There was nothing fortuitous or unforeseen as she went on from one box to another. When she came to the seventh box it was just the same as the others were before it, and there was nothing fortuitous or unforeseen. She strained herself and was injured. She says that the employers are liable to pay her compensation because the injury was caused by accident. Upon those facts the County Court Judge came to the conclusion that there was no accident at all; that there was nothing fortuitous or unforeseen. Speaking for myself, I think that the question whether there has been an accident or not is one of fact, and upon these facts the County Court Judge found that there was no accident. The appellant says that he ought to have found that there was an accident, because the evidence was all one way. I

cannot say that it was so. It is true that there was no conflict of evidence, but yet the evidence is not conclusive that there was an accident. In these cases the Legislature has provided that on such questions the County Court Judge is to decide, and that there shall be no appeal on questions of fact. Three cases have been cited: *Hensey* v. *White* ([1900] 2 W. C. C. 1), *Lloyd* v. *Sugg & Co.* ([1900] 2 W. C. C. 5), and *Walker* v. *Lilleshall Coal Company* ([1900] 2 W. C. C. 7). In every one of those cases we upheld the finding of the County Court Judge. In the first of those cases the County Court Judge held that there was no accident, and we upheld his decision; in the next case the County Court Judge found that there was an accident, from which the injury arose, and in that case we refused to interfere; in the third case the finding was that there had been no accident, and again we supported the award of the County Court Judge. In *Timmins* v. *Leeds Forge Company* ([1900] 2 W. C. C. 10) the County Court Judge held that there was an accident, and we held that there was evidence to support his finding. In the present case the County Court Judge has found as a fact that there was no accident, and we are asked to overrule that finding. For the reasons which I have given, I am of opinion that we cannot overrule the decision of the County Court Judge, and that this appeal must be dismissed.

COLLINS, L.J.: I am of the same opinion. When we are dealing with a word in an Act of Parliament, before we can arrive at a decision of fact as to whether that which the word in question means has taken place or not, we must adopt some standard of what the word means. That involves a proposition of law as well as of fact. The County Court Judge, therefore, has two duties to perform; he must incidentally direct himself as to the meaning of the Act of Parliament, and then he must find, as a jury, whether that which the Act of Parliament means has taken place. It seems to me that the Judge cannot find upon the question of fact without adopting some standard of the meaning of

the Act. If, then, the County Court Judge has misdirected himself as to the meaning of the Act, we ought to send the case back to him for a new trial. If the facts admit of only one inference, and the Judge has so found that he must have misdirected himself as to the law, it would be right to send the case back to him. In the present case I think that the County Court Judge has directed himself rightly, and has then arrived at a decision of fact upon the question which he had to determine. I agree with his decision. I do not hesitate to say that, if he had found as a fact that there was an accident, I should have been of opinion that he had misdirected himself as to the meaning of "accident." I agree, therefore, that this appeal must be dismissed.

STIRLING, L.J.: I agree. I think that the judgment of the County Court Judge is excellent, and it expresses exactly the conclusions of law and fact at which I would myself have arrived.

Appeal dismissed.

Solicitors for the appellant, *Firth & Co.*, for *G. M. Riley*, Halifax.

Solicitors for the respondents, *Williamson, Hill, & Co.*, for *Joseph Walshaw*, Halifax.

Also reported 83 L. T. R. 471.

See note to *Thompson* v. *Ashington Coal Company* (*ante*, p. 21).

June 17, 1901.

## PERRY *v.* BAKER.

### Before His Honour JUDGE STONOR.

*The Law Times, June* 29, 1901.

*Accident—Cause of Injury.*—SEC. 1, 1.

An accident must be from some external cause resulting directly in injury, and not from internal injuries resulting from reasonable personal exertions.

An internal injury caused by the movements of the body in the usual and reasonable exertion of work under perfectly ordinary circumstances is not an accident.

AT the Marylebone County Court, on June 17, his Honour JUDGE STONOR gave his decision in this case.

*Nonweiler*, solicitor, for the applicant; *Berryman*, solicitor, for the respondent.

HIS HONOUR: The applicant in this case is a carpenter and joiner, and was on September 18 last in the employment of the respondents, who are engineers. At the trial he deposed as follows: "I have been in the respondents' employ since October, 1897. During that time on an average I have worked fifty-one hours a week (about full time). On September 18 last I was working at the respondents' works, making a large oak seat or bench. I had got the seat together, and while lifting it up to see if a joint was right underneath, I suddenly felt a pain in my side. The pain fetched me down; I could not straighten myself, and I dropped the bench. I could not continue my work, but had to go home. I acquainted the foreman with the accident. When I got home I sent for Dr. Reynolds, who examined me. I had nothing the matter with me before the accident. After the accident there was a large swelling in my side, and I felt great pain. In consequence of the accident I was in bed for three weeks or a month, and it

was not until about five months after the accident that I left my room. I gave formal notice of the accident on October 10, and I was paid 19*s.* 5*d.* a week until January 5 last. Dr. Reynolds has attended me all along since the accident. I was examined by a doctor sent by the respondents in October, and also in January. On January 31 I received from the respondents the letter [produced] commencing, 'We are instructed by the insurance company not to make any further payment to you,' etc. I am still suffering from the results of the accident. I am not able to get about properly; I am lame, and it pains me to walk." The applicant's appearance at the hearing corresponded with his evidence. He seemed to move with great difficulty, and to be perfectly unfit for work. There was no evidence of any actual disease in the applicant, and the medical evidence for the respondents merely suggested that he had "a tendency in the direction of fatty degeneration." The medical evidence for the applicant was clear both as to the nature and effects of the accident at the time, viz. that the exertion of lifting the bench strained or otherwise injured the applicant in the muscles of the back, and probably otherwise; that the applicant had also received a considerable shock from the accident generally; and there had been little substantial improvement in his condition since the accident; and that his recovery was extremely doubtful. It was, however, contended on the part of the respondents that the accident, or at all events the effects of it, were partly caused by the applicant's stoutness and unwieldiness—in other words, his general condition of body—and that the applicant was therefore barred from recovering in this action. The case of *Lloyd* v. *Sugg & Co.* ([1900] 2 W. C. C. 5), however, shows clearly that such is not the case, supposing that the accident had been partly caused by the applicant's condition of body, or even by actual disease. There could therefore be no reasonable doubt that the applicant was entitled to compensation under the Act if the "accident" came within the Act, and

it was, in fact, regularly paid to him until January 5 (more than three months) by the respondents, with the concurrence of the insurance company in which the latter were insured. The only question, therefore, to be decided in this action is whether the injuries which the applicant received arose from an "accident" within the meaning of the Act, which question was also raised by the respondents' counsel. Now, according to the natural meaning of the word "accident," its definition in every dictionary, and its use in common parlance, and in the absence (as far as I can see) of any provision in the Workmen's Compensation Act narrowing its signification or requiring it to be narrowed, I should have no hesitation in finding that the fact of being "brought down to the ground and disabled for work" by simply lifting a seat through straining or injuring the muscles of the back, without any unusual or unreasonable exertion, was an "accident" within the meaning of the Act, and in holding that the breaking or injuring a muscle or other portion of the human frame in the due execution of the employer's work appears to me to be the same as the breaking or injuring any tool or instrument under the like circumstances, and therefore that the employer would be equally liable under the Act in both cases for any consequent evil results to the workmen employed. If, therefore, the point were untouched by judicial decisions, I should certainly find for the applicant. There are, however, certain recent decisions of the Court of Appeal which point to a different conclusion, and show that the learned Judges of that Court are of opinion that a narrowed construction ought to prevail, but the exact ground of that opinion, I regret to say, I have failed to discover. I refer particularly to the cases of *Hensey* v. *White* ([1900] 2 W. C. C. 1), *Walker* v. *Lilleshall Coal Company* ([1900] 2 W. C. C. 7), and *Timmins* v. *Leeds Forge Company* ([1900] 2 W. C. C. 10). In the first two cases the Court decided in favour of the respondents, and in the third case in favour of the applicant, but on the ground that some planks had been unexpectedly

frozen to each other, and consequently required unforeseen and unusual exertions from the applicant in lifting them. Independently of special circumstances like those I have just mentioned, the Court of Appeal in these and other cases has held (as I understand) that to come within the meaning of the Act an "accident" must be from some external cause resulting directly in injury—*e.g.* a blow through a miss-hit (*Lloyd* v. *Sugg*), or a sudden frost (*Timmins* v. *Leeds Forge Company*), and not from internal injuries resulting from reasonable personal exertions in working engines (*Hensey* v. *White*), or the handling of usual materials and appliances (*Walker* v. *Lilleshall Coal Company*). In the present case the accident, for "accident" it was, whether within the meaning of the Act or not, was the internal injury to the applicant in the muscles of his back through the movements of his body in the usual and reasonable exertion of lifting a bench under perfectly ordinary circumstances, and I can see no material distinction between it and the cases of *Hensey* v. *White* and *Walker* v. *Lilleshall Coal Company* I have just mentioned, and I feel bound by the decisions of the Appeal Court in those cases to find for the respondents.

This case is under appeal.

See note to *Thompson* v. *Ashington Coal Company* (*ante*, p. 21); and *Lee Boardman* v. *Scott* (*post*).

## LEE BOARDMAN *v.* SCOTT & WHITWORTH.

Before His Honour JUDGE PARRY.

*The Law Times, May* 25, 1901.

*Accident—Internal Injury—External Accident—Fortuitous and unforeseen event.*—SEC. 1, 1.

An internal injury caused to a person in a normal state of health by a fortuitous and unforeseen event in the usual course of his business is an accident.

AT the Manchester County Court, on April 24.

*Sutton* for the applicant.

*Acton* for the respondents.

HIS HONOUR: In this case the following facts seem to me material, and on the evidence I find them as facts. The applicant is a skilled power-loom overlooker. He was in a normal state of health at the time of the accident. The accident arose while he was lifting a beam of about 100lb. weight. This was part of his ordinary duty, and he had done it successfully on many occasions. This particular beam was uneven by reason of a flange patched on to the beam, but I find that there is not sufficient evidence to satisfy me that the flange added materially to the chance of accident. It may or may not have contributed to the accident. I find as a fact that whilst lifting this beam he suddenly tore several fibres of the muscles of the back. The muscles were not ruptured, but the fibres were torn. The cause of this is obscure. It may have been a slip or a twist of the body, or a wrong movement of the body. It was, in my view, an unexpected or fortuitous movement of the man himself, throwing an undue weight or strain on the muscles of the back—muscles that if used in the ordinary way were sufficient for the purpose for which they

were being used and had been used for the last four years. He has since undergone proper treatment, and is still suffering from the injury, which, in my view, results from the accident. Upon these facts I have to say whether the applicant is suffering from "personal injury" by accident within sec. 1 of the Act. The personal injury is admitted. Was it caused by accident? Taking the words of the Statute as they stand, apart from judicial interpretation, I think there is no doubt of it. The word "accident" is a popular word of very wide meaning. Originally a grammarian's word, it has been used from Dr. Johnson's time until to day to mean "that which happens unforeseen, casualty, chance." For four years this man had successfully used these muscles to lift this weight; owing, perhaps, to carelessness, perhaps to a slip, perhaps to some other cause, except disease, he snaps the fibres of the muscles that had always successfully done the work, and if any ordinary person had been asked what had happened to him, he would have said that the man had had an accident, and I think the word would have been rightly used. To me it is the same as if he had been using a rope strong enough for the purpose, and by overstrain or sudden jerk the rope had snapped and the beam had fallen upon him. That would be an accident. In one case the work is done by a rope; in the other by a set of muscles. In each case the machinery is normally fit for the work, but the unexpected happens, and the rope or muscle snaps and there is an accident. To my thinking, there is in the word "accident" always an element of injury. Thus, two individuals make the same slip on the stairs; one injures himself, but the other does not. We say the first has met with an accident, but the slip without the injury would, I think, be a happening that was not an accident. It is the slip plus the injury that is the unforeseen happening or accident. Mr. Acton says, quoting *Hensey* v. *White* ([1900] 2 W. C. C. 1), that I am precluded from saying this by the interpretation put upon the words of the section by the Court of Appeal. I

need hardly say, if I were clear that this was so, I should at once find for the respondents, however painful it might be to do so. Mr. Acton bases his argument chiefly on the use of the word "external," quoting the Law Reports headnote, p. 481. He says the result of the cases is that an injury to be within the Act must be caused to a workman by some "fortuitous and external event." As to the word "fortuitous," I do not think I need trouble much about it. If the injury were caused by disease, it is clear that the applicant could not recover; but I find as a fact the man was not in any way diseased. Indeed, it was not seriously contended that he was. "Fortuitous" means "accidental," "casual," "happening by chance;" and I have already said that, in my opinion, this injury was caused by an accidental and fortuitous event. But, to use the words of the headnote, was the event "external"? I confess I do not understand the suggestion clearly, and to test it I put four cases, thus: (*a*) A man is hit by a hammer used by another; (*b*) a man falls from a slip and falls into moving machinery; (*c*) a man playing tennis slips and strains a muscle; (*d*) a man walking upstairs twists his foot and sprains his ankle. Now, how many of these are fortuitous and external events? Case (*a*) is clearly so. That is the decision in *Lloyd* v. *Sugg* ([1900] 2 W. C. C. 5). The accident there was fortuitous and external. Case (*b*) I am not clear about. There the accident was a slip. That was fortuitous, but not external. The machinery was external, but not fortuitous. Besides, the machinery was not the happening or the event. There was nothing casual or unforeseen about that; the slip was the accident. Perhaps the right view is that all the circumstances constituted the accident; if so, some of those circumstances were external, and the case comes within Mr. Acton's definition. But cases (*c*) and (*d*) seem to me to have nothing but fortuity about them. They are to me accidents, and very common accidents, but they are not "fortuitous and external events." I therefore feel that the accident in the

case before me was "fortuitous," but, as far as I understand the use of the word "external," it was not "external." I now look to find how the word "external" comes into the headnote. The only appearance of the word "external" in the judgments is the use of the word by the Master of the Rolls, where he says: "In the second case before the Court (*Lloyd* v. *Sugg*) we held that a miss-hit was an accident, and that the workman was entitled to compensation for injury to his hand resulting from gout set up by the miss-hit, *which was something external to the man himself*, and was something fortuitous and unexpected." I cannot agree with the learned reporter that the Master of the Rolls intended to say that all accidents must be "external." My Lord was, as I understand it, merely saying that in this case the injury was not caused by disease, because clearly it was caused by something external and also accidental. In my view, the Master of the Rolls was merely describing one accident, and not defining all accidents. Some accidents are undoubtedly external in every detail, others are not; but I am not satisfied that the Court of Appeal has laid down that external accidents only are within the Act. What they have ordered me to do is to satisfy myself whether the injury was caused by disease or accident, and I have done so in this case. I am the more strengthened in my opinion by the fact that the *Law Journal*, the *Law Times*, and the *Weekly Reporter* make no mention of the word "external" in either their reported judgments or their headnotes. As Lord Justice Collins said, in *Roper* v. *Greenwood* (*ante*, p. 27): "The Judge must direct himself as to the meaning of the Act of Parliament, and then he must find as a jury whether that which the Act of Parliament means has taken place." In that particular case there was no accident, because the injury was a peculiar one that commonly results from a woman lifting weights, and a doctor would probably have forewarned the woman of that. It is a result easily foreseen, and there is nothing fortuitous about it. I have written my judgment

at unusual length, because the argument about the external nature of the accident impressed me, and the case seems of grave importance to workmen. I have endeavoured to follow the decisions, and I have thought it right to set out fully the steps by which my decision has been arrived at, so that if I am wrong it will be the more easy to formulate a definition that will prevent further error.

Award, 18*s*. a week as from September 9, 1899, with costs on B scale.

This case is under appeal.

See note to *Thompson* v. *Ashington Coal Company* (*ante*, p 21.).

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## FITZPATRICK *v.* HINDLEY FIELD COLLIERY COMPANY.

Before His Honour JUDGE BRADBURY.

*The Law Times, April* 13, 1901.

*Employment—In the course of—Commencement—Waiting at pit brow.*—SEC. 1, 1.

A miner's employment has commenced when he has obtained his pit-lamp and his "tallies," and is waiting at the pit brow to descend.

AT the Wigan County Court, on March 19, before his Honour JUDGE BRADBURY, Thomas Fitzpatrick, collier, of 9, Okell Street, Leigh, claimed compensation from the Hindley Field Colliery Company, Hindley. It was admitted that on November 16 last Fitzpatrick fell down a coal screen at respondents' colliery, thereby injuring his knee, but the respondents contended that the injury did not arise out of or in the course of the man's employment.

*T. R. Dootson*, for the applicant, stated that on the

night of November 16 Fitzpatrick was on the pit brow with the intention of proceeding down the shaft to his work. Rain was falling, and whilst waiting for the cage applicant sought shelter under an erection which covered a screen. Fitzpatrick, seeing another collier standing in the rain, shouted to him to come under the shelter, and, when making room for him, applicant fell down on the screen belt, a distance of about 9 feet. Fitzpatrick had already received his pit lamp from the man in charge of the lamp room, and had also taken his "tallies" from the tally room, and he (Dootson) urged that employment had begun, and that the accident did arise out of and in course of that employment.

*Allen*, for the respondents, said that what had to be decided was where the man's employment commenced. He admitted there must be a difference between his work and employment, because he was obviously employed before he got to the place where he had to do his work. The man was essentially employed underground, and he submitted the man came in their employment and under their control when he stepped into the cage and left the pit bank, but until he got into the cage he was a perfectly free agent, and could go home if he liked. The dictum of Smith, L.J., in *Holmes* v. *Great Northern Railway Company* ([1900] 2 W. C. C. 19), was that in the case of a coalpit "a miner's employment begins as soon as he leaves the bank." The Miners' Eight Hours Bill also defined the employment as being between leaving the pit bank and returning to it. [His Honour said he had to look at the ordinary signification of the word, not the definition contained in a particular Act of Parliament.]

His Honour said the case raised a very interesting point, and one which no doubt was of great importance to colliery owners and to mine workers. The question for decision was whether the employment of the applicant was in force at the time the accident happened. In these cases it was often difficult to say when the employment began, but in

this instance there seemed to be no substantial difference between a man going down the shaft in a cage and his walking to the pit mouth to get into the cage. In both cases he was on his master's premises, and he was on those premises for the master's purpose. Applicant had identified himself as a servant, as he had got his pit lamp and tallies, and the relationship of master and servant was established. Mr. Allen had urged that applicant could have returned the lamp and tallies, but so long as he retained them it seemed to him (his Honour) that the employment was in force. He could equally have returned them after he had begun work in the pit. He, therefore, held that the accident arose out of and in the course of his employment, and awarded applicant compensation after the rate of 20*s.* a week from November 30 till February 4, and allowed costs on B scale.

*Allen* asked for a stay of three weeks, and this was granted.

The following is the learned Judge's decision: I found as facts that the applicant, being in the employ of the respondents as a collier, went on the day in question to the colliery, and at the lamp-shed a lamp was handed to him by the person in charge for the purpose of the applicant working in his working place, and that the applicant then went and got his tallies, which were to be used by him in his work; that he was at the time of the accident necessarily waiting on the pit brow till his turn came to enter the cage and descend the pit, and that the night being wet, and no other place of shelter being provided, it was reasonable for him to shelter where he did. On this state of facts I held that the applicant was at the time of the accident in the employment of the respondents, and that the accident arose out of and in the course of the employment. I was of opinion that it was only in the capacity of—as being then and there—a servant that he received and held the lamp and took and had possession of the tallies, and that therefore the employment had begun.

I was of opinion that the observation of Lord Justice Smith relied on was only used by him as an illustration in fact of the point that "employment" sometimes begins before "work," and that it was never intended to be a decision in point of law that a collier's employment could not begin before he entered the cage. I therefore gave judgment for the applicant for £1 a week from November 30 to February 4, and costs on the B scale.

This case is under appeal.
See cases on this subject in Vols. I. and II.

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March 26, 1901.

## WHITEHEAD *v.* READER.

Before A. L. SMITH, M.R., COLLINS and ROMER, L.JJ.

84 *L. T. R.* 514.

*Employment—In the course of—Disobedience.*—SEC. 1, 1.

A mere venial act of disobedience which, if not forbidden, would be within the scope of employment, does not discontinue the employment so that an accident occurring while performing such an act can be said not to be in the course of such employment.

THIS was an appeal by the respondent in the County Court from a decision of the judge of the Coventry County Court awarding the applicant compensation under the Workmen's Compensation Act, 1897.

The applicant was a carpenter in the employ of the appellant in a factory. Part of the applicant's duties were to sharpen tools upon a grindstone in the factory, which was turned by means of a leather band which connected it with a steam engine in the factory.

On one occasion, while he was sharpening a tool on the grindstone, the band slipped off the wheel. The applicant

tried to put the band back again, and in so doing he accidentally suffered the injuries for which he claimed compensation under the Workmen's Compensation Act, 1897.

The applicant had been expressly ordered by the appellant not to touch the machinery.

The County Court Judge said that, in trying to replace the band, the applicant was acting contrary to orders, but he held that the accident arose out of and in the course of the applicant's employment, and he awarded compensation under the Act.

The appellant appealed.

*March* 12.—*T. Willes Chitty*, for the appellant: As the applicant had been expressly ordered not to do the thing which caused the accident, the accident cannot be said to have arisen "out of and in the course of the employment" within sec. 1 of the Act: *Lowe* v. *Pearson* ([1899] 1 W. C. C. 5). This was not a case of an "emergency." An emergency cannot arise except when a man or property is in danger, and some injury is likely to happen unless something is done to prevent it. Here the only thing that happened when the band came off was that the grindstone stopped: *Rees* v. *Thomas* ([1899] 1 W. C. C. 9).

*Montague Lush*, for the applicant: It was part of the applicant's duty to sharpen tools on this grindstone, and he could not do his duty unless the band were on. In putting the band on he was acting in furtherance of his master's business. It cannot be that every disobedience to a master's orders must necessarily cause a workman to cease being engaged in his master's employment. He referred to *McNicholas* v. *Dawson* ([1899] 1 W. C. C. 80).

*Chitty* in reply.

*Cur. adv. vult.*

*March* 26.—SMITH, M.R.: This is an appeal by a master in proceedings taken by a workman to assess compensation under the Workmen's Compensation Act, 1897. The learned County Court Judge had awarded him

12*s.* 6*d.* per week, and the master appeals upon the ground that the injury did not arise out of and in the course of the workman's employment. That is the only point. From the Judge's notes, which alone we are able to get, and which are a *résumé* of the case and not notes of the evidence of the individual witnesses, these appear to be the facts: The workman was employed in a factory within the meaning of the Act, and as part of such employment he had to grind his tools at a grindstone which was being rotated by a band driven by steam power. Whilst he was so employed the band slipped off, and the man endeavoured to adjust it, and, whilst so doing, he was injured. That the injury arose *primâ facie* out of and in the course of his employment is to me clear; but the man had been told not to touch the machinery, and it is said that this causes the injury not to have arisen out of and in the course of his employment. Does disobedience to this order cause the man not to have been injured in the course of his employment? I think not. It cannot be said that every disobedience to an order terminates a man's employment. Disobedience may or may not give a defence to a master under the clause relating to serious and wilful misconduct. The learned County Court Judge was right in holding that the case of *Lowe* v. *Pearson* (*ubi sup.*) has no application to the present case. That was a case where a boy was employed in manual labour in making clay into balls, and then handing the balls to a woman who was employed at a machine driven by steam. That was his sole duty, and he was expressly ordered not to touch the machine. In spite of these orders, he meddled with the machine in the temporary absence of the woman, and was injured. The Court of Appeal held that the accident causing the injury did not arise out of and in the course of the boy's employment. The present case is a very different one. The workman's employment was to grind tools at this grindstone. It was a natural thing for him to do, when the band which turned the stone slipped off, to try and

put it on again, and in so doing I think that he was acting in the course of his employment. I think that the appeal must be dismissed.

COLLINS, L.J.: I have come to the same conclusion, though I have felt considerable difficulty in arriving at a clear opinion as to what the County Court Judge has found in fact. At first I was disposed to think, from one of his findings, that he had found that the orders of the master had defined the sphere of the workman's employment, and had limited it to the work of merely sharpening tools, excluding from it any interference with the machinery that turned the grindstone. But taking the whole of the County Court Judge's notes together, and remembering that they do not purport to be a record of the evidence, but merely a *résumé* of the facts as he regarded them, I think it would be impossible to say that the County Court Judge has found as facts that the two spheres of employment, viz. the sharpening of the tools and the management of the machinery of the grindstone, were separated by the master's order. I agree that it is not every breach of a master's order which will determine a workman's employment so as to excuse the master from liability to his servant for injury resulting from breach of the orders. It is necessary to see exactly what is the sphere of the workman's employment, and, in my judgment, it is and must be competent for a master to define and limit what that sphere of employment is. If a workman acting within that sphere violates an order of the master, the master may well be responsible. But if the workman travels out of the sphere, as limited by the master, and acts in violation of the master's orders, or if the breach of the master's orders involves the workman's travelling outside the sphere of his limited employment, I do not think that the master would be liable for the consequence of the workman's acts either to the workman or to third persons. Take, for instance, the case, recently decided in this Court, of *Beard* v. *London General Omnibus Company* (83 L. T. R. 362;

[1900] 2 Q. B. 530). There the conductor of an omnibus belonging to the appellants, the driver having got off the box, took upon himself, in breach of the company's orders, to drive the omnibus, and in so doing negligently ran down and injured the applicant. The Court held that the company were not liable, because it was no part of the conductor's duty to act as driver. So, in the present case, if the two spheres of employment, the grinding of the tools and the management of the machinery which turned the grindstone, had been distinctly separated and defined, and if in breach of the orders limiting the sphere of employment on which the workman was engaged, he had done something which accidentally resulted in an injury to himself, I should have thought that such an accident would not have arisen out of and in the course of his employment, and the master would thereupon not have been liable. But the County Court Judge has come to the conclusion that the accident did arise out of and in the course of the employment, and we are not given any materials on which we should be justified in saying that he went wrong in a point of law.

Romer, L.J., read the following judgment: I also think that we ought not to differ from the County Court Judge in this case. He appears to have found that the accident arose out of and in the course of the workman's employment, and that, in disregarding the master's orders not to touch the machinery, he was not guilty of serious and wilful misconduct. The evidence taken in the County Court is not before us, and the appellant is not able to furnish us with any notes of the evidence. That being so, we have to depend upon the meagre notes of some findings supplied by the Judge. From these it does not appear that the decision of the Judge cannot be, or ought not to be, supported. At the time of the accident the workman was employed on his master's business. He was not idling or doing something which was clearly beyond the scope of his employment. To make the grindstone work, and so

be able to sharpen his tools, the carpenter may well be said to have been about his master's business when he tried to replace the band, and that on the impulse of the moment he should have forgotten the order as to not touching the machinery is not unnatural, and may well be regarded as a venial act, and not as being wilful misconduct on his part. I am not able to gather from the facts of the case that the replacing of the band was an act on the workman's part so remote from his ordinary duties that it could not be fairly said to be one arising out of and in the course of his employment. It is not the case of a workman, whose duties in no way bring him into contact with his master's machinery, officiously or for his own purposes meddling with that machinery contrary to orders and so being injured. The principle upon which cases like *Lowe* v. *Pearson* (*ubi sup.*) were decided has no application to the present case.

Appeal dismissed.

Solicitors for the applicant, *Maddocks & Colson*, for *H. Maddocks*, Coventry.

Solicitors for the appellant, *Sharpe, Parker, & Co.*, for *Hughes & Masser*, Coventry.

Also reported (1901) 2 K. B. 48; 70 L. J. K. B. 546; 84 L. T. R. 514; 49 W. R. 562; 65 J. P. 403; 17 T. L. R. 387.

See cases on this subject in Vols. I. and II.

## JONES *v.* LONDON & SOUTH WESTERN RAILWAY COMPANY.

Before His Honour JUDGE GYE.

*The Law Times, June* 29, 1901.

*Serious and wilful misconduct.*—SEC. 1, 2 (*c*).

If a workman unnecessarily breaks an express and emphasized order made solely for his own protection, and which he fully understands and appreciates, he is guilty of serious and wilful misconduct.

AT the Winchester County Court, on June 12, his HONOUR gave his decision in this case. This was an arbitration under the Workmen's Compensation Act, 1897, in respect of a claim by Mrs. F. Jones, of Basingstoke, to recover the sum of £230 from the respondents as compensation for the loss of her husband, Henry Edward Jones, who died from injuries which he received near Itchen Abbas Station on June 27, 1900.

*H. W. Chandler*, solicitor, for the applicant; and *Clavell Salter* (instructed by *S. Bircham*, of Waterloo Station, London) for the respondents.

The following cases were cited: *Lewis* v. *Great Western Railway Company* (37 L. T. R. 774; 3 Q. B. Div. 195), *Re Young & Houston's Contract* (53 L. T. R. 837; 31 Ch. Div. 168), *Re Tubbs and Mayor of London* (70 L. T. R. 719; [1894] 2 Ch. 524), *Rumboll* v. *Nunnery Colliery Company* ([1899] 1 W. C. C. 28), *McNichol* v. *Spiers* ([1899] 1 Scotch Sess. Cas. 609), *McNicholas* v. *Dawson* ([1899] 1 W. C. C. 80), *Holmes* v. *Great Northern Railway Company* ([1900] 2 W. C. C. 19), *Glenister* v. *Great Western Railway Company* (29 L. T. R. 423), *Dailly* v. *John Watson Limited* ([1900] 2 Scotch Sess. Cas. 1004).

His HONOUR: The company admit the circumstances from which the accident resulted, but contend that the claimant is not entitled to compensation upon the ground that the deceased man was guilty of serious and wilful misconduct within the meaning of the Workmen's Compensation Act. The cases under that Act in which these words have been considered are very few, and I have been unable to find any case which bears exactly on the facts in the present application. The accident happened on June 27, 1900, in the following circumstances: The deceased man was the fireman of an engine which left Southampton Station at 8·53 in the morning for London. The train stopped at all stations, and in due course was timed to arrive at Itchen Abbas at 9·44 a.m. When the train had left Itchen Abbas and had gone a short distance, the driver became aware that the fireman was not on the footplate. He turned round, and then discovered him to be lying on the coals at the rear of the tender. He immediately got on to the coals and took the man down to the footplate. The fireman had been struck on the back of the head, and was very seriously injured. The driver drove the engine to the next station, where the fireman was taken off, and he was then found to be dead. There is no absolute evidence that the man in fact struck against an arch, but there is no doubt that he did so, because when the engine-driver saw the poor man on the coal, they had just passed under the second arch after leaving Itchen Abbas Station, and, upon a subsequent examination of the arch, a small fragment of hair, or something of that kind, was found on the brickwork. Those are the only facts connected immediately with his death, and the claimant brings her action on the assumption that death occurring in that state of circumstances entitles her to compensation. The company, in answer to the claim, plead that the deceased man was guilty of serious and wilful misconduct; and, in giving evidence in their defence, they proved that in 1896 or 1897 there had been several accidents in

consequence of firemen leaving the footplate whilst the engine was in motion, and that they caused to be printed, in red ink, a large placard, headed: "L. & S.W.R.—Notice to enginemen and all concerned. Enginemen and firemen must not leave the footplate of their engine when the latter is in motion. By order." It also stated that the notice must be posted on all notice-boards at stations, offices, etc., and that the foremen were to call the attention of enginemen and firemen to the instructions and arrangements therein specified, take their signatures as having read the same, and report all cases of neglect. Evidence was given that copies of that notice were put up in all the sheds to which enginemen and firemen had occasion to go in the course of their duty. Furthermore, that it was entered in what was called the notice-book—a book in which are inserted references to all notices which affected the men employed by the company from time to time, and which the men upon their first engagement, and also upon any fresh notices being issued, are required to sign. Evidence was also given by the driver of the engine upon which the fireman was killed that when the man first came to him as a fireman, or very shortly after the issue of this notice in 1896, they had discussed it, and the meaning of it, and the reason why it had been put up. In these circumstances there is no question that the deceased man was fully cognizant of the notice, and was well aware of the reasons for which it was put up. That knowledge does bear very materially on the question as to whether or not what he did amounts to serious and wilful misconduct within the meaning of the Act. There is also another well-known rule that enginemen have to get sufficient coal down into the well of the tender, from which they immediately feed the furnace, while the train is standing at the different stations, and that rule was made for the express purpose of preventing the men having to get on the tender while it is in motion. The average amount of coal consumed on the journey was stated, and the driver added that there was

more than sufficient when they started from Itchen Abbas to take them on to Alton. It was therefore quite unnecessary for the deceased man to get on the tender at all. There is a further rule that if men have to go on to the tender they must wait until the engine is stopped, or, if there is any urgent reason, they have to stop the engine for the purpose. All these precautions are taken for the benefit of the men themselves, and, if by disobedience to rules of this kind accidents happen to men, I think it is safe to say that in the large majority of cases their widows or dependants will not be entitled, in my view, to recover any damage or compensation. The sole question which I have to decide is, Was the deceased man guilty of serious and wilful misconduct? Serious and wilful misconduct does not necessarily mean misconduct in the nature of getting intoxicated or using obscene language whilst on duty. In its legal meaning it would include a disregard of rules such as those made in this case, which disregard would disentitle the injured man or any one dependent upon him from recovering damages from the company. The question is one of serious importance to the widow and children, and also to the respondents, the railway company. In my view, the respondents have done all that they reasonably can to obviate the risk of an accident such as this. They could not do more. They cannot for every single *employé* have some one else to see that he performs his duty. All they can do is to give such general directions and lay down such rules as will call the attention of their servants to any danger and to the means of avoiding it. The only person who is to blame for the very sad accident is the poor man himself. The rule was well known to him, and it was discussed in the very light of the danger to which it was sought to call his attention. It must therefore be taken that, as a matter of law, it was knowingly broken by him, and I think the fact of his going on the tender of the engine, which there was no necessity to do at that time, is serious and wilful misconduct within the

meaning of the Workmen's Compensation Act, and that his dependants are thereby debarred from recovering compensation. The result will be that judgment will be entered for the respondents. I understand that before any question of proceedings was raised, the company made a present to the widow of £50; and that other compensation had also been given her. The railway company were in no way liable to do this; they did it out of good feeling for the widow of an old servant, and in no sense as a sum in discharge of any subsequent claim, but as a pure gratuitous present. They further instructed their counsel, Mr. Clavell Salter, to say that they would not ask for costs should the judgment be in their favour. That was also a very considerate thing for them to do in the circumstances. Judgment will therefore be entered for the respondents, without costs.

See cases on this subject in Vols. I. and II.

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June 21, 1901.

## JONES *v.* GREAT CENTRAL RAILWAY COMPANY.

Before His Honour JUDGE MASTERMAN.

*Implied Agreement—Dispute—Arbitration.*—SEC. 1, 3.

A claim in writing for compensation which is admitted, and the payment of the maximum weekly payments allowed by the Act, together with a promise to continue those payments during disability, does not amount to an agreement if a request for arbitration be subsequently filed. In such a case the applicant is entitled to an award and to be paid the costs of the arbitration.

THIS case was heard on June 21, 1901, at the County Court of Yorkshire holden at Doncaster.

*Muir Wilson*, solicitor, appeared for the applicant.

*Minton-Senhouse* appeared for the respondents.

HIS HONOUR made his award as follows: No evidence

was called, because the facts were admitted. The applicant, on January 25, 1901, while engaged in his employment by the respondents as a boilersmith's labourer suffered from an accident which resulted in loss of his second finger and a portion of the third finger of his left hand. His average weekly earnings before the accident was 19*s.* 10*d.* On February 11, 1901, the applicant's father wrote on his behalf, claiming compensation under the Workmen's Compensation Act, 1897. The respondents had never disputed their liability to pay full compensation under the Workmen's Compensation Act, and, in fact, had paid the same from 14 days after the accident, and are still paying it. On February 23, 1901, the applicant received all arrears of weekly payments, but refused to sign a memorandum of agreement that was submitted to him, stating that he wanted a lump sum. The applicant on other occasions stated that he would not accept work unless he was paid a lump sum. The applicant's solicitor, on May 7, wrote: "I shall be glad to hear whether you are prepared to make any offer of settlement of the matter. Please treat this letter as notice of my client's accident and claim to compensation under the Workmen's Compensation Act, 1897." To this the respondents replied, on May 16, 1901, that they were paying the full weekly allowance, and that these payments would continue during disability. The request for arbitration was filed on May 17. On May 22 the respondents sent a memorandum of the alleged agreement to the Registrar, with a request that the same should be recorded. The Registrar declined to record such memorandum, on the ground that the request for arbitration was on the file. In their reply to the request for arbitration the respondents claimed to have such memorandum filed. It was argued before me: (1) That no question had arisen within the meaning of sec. 1, 3, of the Act; (2) that if a question had arisen it had been settled by agreement within the meaning of that sub-section; (3) that there was

therefore no jurisdiction to hear the arbitration; and (4) that the Registrar should be directed by me to file the memorandum sent to him on May 22, 1901. I was of opinion that unless the admitted facts constituted an agreement by necessary implication of law no agreement was proved before me, and, on the contrary, that the filing of applicant's request for arbitration was evidence that no such agreement in fact existed, and the applicant was entitled to have his request for arbitration heard and adjudicated on, and I awarded the applicant 9*s.* 11*d.* a week, with costs on the B scale.

See cases, *post.*
This case is under appeal.

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May 20, 1901.

## WEBSTER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Before His Honour JUDGE PARRY.

*The Law Times, June* 29, 1901.

*Implied Agreement—Arbitration.*—SEC. 1, 3.

There is no jurisdiction to hold an arbitration where there is an existing implied agreement between the parties.

THIS case was tried at the Salford County Court.

The applicant, Webster, claimed that he was entitled to an award for the weekly sum of 11*s.* 5*d.*, which had been paid to him by the respondents under the Act from the second week after the accident, and at the date of the issue of the arbitration proceedings was also being paid to him.

There was no dispute between the parties as to the fact that the applicant was receiving the full weekly payments

he was entitled to under the Act, the simple issue being whether he was entitled to an award, the respondents contending that, there being no dispute, the arbitrator had no jurisdiction to make the award, but that the applicant's remedy, if he thought fit to perfect his title under the Act, was to register a memorandum of the verbal agreement they (the respondents) alleged subsisted between them and the applicant in the manner prescribed by sched. 2, para. 8, viz. to send to the Registrar of the local County Court a memorandum of the facts of the agreement and ask him to register it, when the same would be enforceable as a County Court judgment.

Incidentally the question arose as to whether the Judge could imply an agreement from the above facts, but in the result he held, partly on the authority of *Bradbury* v. *Bedworth Coal and Iron Company* ([1900] 2 W. C. C. 138), that he could imply an agreement between the parties to pay 11*s.* 5*d.* per week, and such agreement need not be in writing, and, having implied such an agreement, he held that there was no dispute between the parties, and therefore that the applicant was not entitled to an award, it being necessary, before arbitration proceedings could be instituted, that there must be a dispute to confer jurisdiction, and here on the facts there was no dispute.

See cases at pp. 50–58.

## BUSBY *v.* RICHARDSON.

### Before His Honour JUDGE WIGHTMAN-WOOD.

*The Law Times, July* 6, 1901.

*Implied Agreement—Dispute—Arbitration.*—SEC. 1, 3.

An implied agreement for compensation is a bar to proceedings in arbitration.

THIS was an application for an order that a memorandum of agreement be recorded with a view to its enforcement as a judgment.

Mr. *A. Watson* (Lutterworth) appeared for the applicant, and Mr. *W. Simpson* (Leicester) for the respondent.

Mr. *Watson* stated that the applicant was a labourer, employed by a Mr. Herbert, who was a sub-contractor to the respondent, who was employed by a Mr. Abbott to build certain houses in Lutterworth. On March 10 applicant was injured by a fall from a ladder. Notice of the accident was sent to respondent on March 14, 1900, to which the respondent replied that he was not the man's employer. On March 28 applicant's wife wrote that respondent was liable as undertaker, and that applicant's claim was 11*s.* 9*d.* per week during incapacity, being one-half of applicant's weekly wages before the accident. As respondent did not reply, applicant's solicitors wrote pressing the claim, and thereupon, on June 12, 1900, the respondent wrote to the applicant's solicitors sending a cheque "for the amount claimed," and stating that "if Busby required the money weekly it would be ready if sent for." The weekly payments were regularly made until February 9, 1901, after which the respondent refused to make any further payment unless the applicant obtained an award.

On these facts (which were admitted) Mr. Watson now applied that a memorandum should be recorded in accordance with the Act, setting out that on June 12, 1900, the parties had agreed that the respondent should pay the applicant 11*s.* 9*d.* a week during incapacity arising from the accident.

Mr. *Simpson* submitted that there was no agreement to record, and said that respondent had paid without question, because the applicant was not expected to live long, but that, though he did not die, he was in a very serious state of health for a long time after. As soon, however, as he was somewhat recovered the respondent discontinued the payment, so that the whole matter as between the applicant, the respondent, and the sub-contractor could be properly decided. The only way in which the respondent could obtain indemnity against the sub-contractor for which any provision had been made by the Acts and rules was by the applicant filing a request for an arbitration in the ordinary way, and he (Mr. Simpson) contended that this should be done, as no agreement had been made or signed by the respondent such as could be enforced without an award.

His Honour said that Mr. Simpson's case was disposed of by the case of *Bradbury* v. *The Bedworth Coal and Iron Co.* ([1900] 2 W. C. C. 138), decided by him at Nuneaton, and carried to the Court of Appeal, in which the Court of Appeal, affirming his judgment, held that an agreement made verbally, or one merely to be implied from the conduct of the parties, was sufficient to render an arbitration unnecessary; and, further, that an agreement, however arrived at, might be varied or determined by mutual consent, without any writing or formal proceeding. The policy of the Legislature was that in these cases everything should, if possible, be done by agreement, and that when the parties had agreed, there should be no litigation. He would express no opinion as to whether the respondent could obtain indemnity from the sub-contractor, but as

between the applicant and respondent he was bound to follow *Bradbury's Case*, and to hold that an agreement had been made, and that there was no question left for arbitration. He would, therefore, order a memorandum to be recorded as follows: "That on June 12, 1900, the respondent had agreed to pay the applicant 11*s.* 9*d.* per week during his total incapacity from an accident which occurred in the course of his employment on March 10, 1900, such payment to be subject to the provisions of the Workmen's Compensation Act."

Application allowed, with costs on scale A.

See cases at pp. 50–58.

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May 18, 1901.

## PERRY *v.* CLEMENTS.

Before RIDLEY, J.

17 *T. L. R.* 525.

*Claim for Compensation—Notice of Injury.*—SEC. 2, 1.

A mere notice of injury is not a claim for compensation or a proceeding to recover compensation.

THIS case came on for further consideration. It was a claim by John Perry to recover damages for personal injuries sustained by him owing to the negligence of the defendant's servants. The case was tried before his Lordship and a common jury, and they found a verdict for the plaintiff for £225. The plaintiff was a sawyer in the employ of Messrs. Jones Brothers, of Oakwood Court, Addison Road. The defendant was a contractor carrying on business at Montgomery Street, Hammersmith. On March 12 last, while the plaintiff was having his dinner at Messrs. Jones's works, a horse and cart belonging to the defendant was backed against some stone, near where the

plaintiff was, and a portion of the stone fell on him, causing injuries of a serious character. It appeared that after the accident, on May 17, a notice of injury in accordance with sec. 2 of the Workmen's Compensation Act was served on the plaintiff's employers, Messrs. Jones Brothers, notifying that he had been injured. No further proceedings under the Act were taken by the plaintiff, or claim for compensation made by him against his employers, as they voluntarily continued paying his wages.

Mr. *Shearman* (who appeared for the defendant) now submitted that judgment ought to be entered for the defendant on the ground that the plaintiff had taken proceedings against his employers for compensation under the Workmen's Compensation Act, and was therefore, by sec. 6 of the Act, estopped from recovering damages from the defendant in respect of the same injury. Counsel contended that the document notifying the injury which was served on the plaintiff's employers was a notice and a claim for compensation as well. He cited *Powell* v. *The Main Colliery Company* ([1900] 2 W. C. C. 25, 29).

Mr. *Witt*, K.C. (who, with Mr. *Alan Macpherson*, was for the plaintiff), argued that the plaintiff was entitled to judgment. The notice of injury served on the plaintiff's employers was not a proceeding under the Act unless it was followed by a claim for compensation. That was really the initiatory proceeding under the Act. Sec. 6 of the Act could not be pleaded in bar to an action unless the plaintiff had already recovered compensation under the Act. In this case the plaintiff had not recovered compensation at all. It was impossible to suppose that the Legislature intended that if a man gave a notice or made a claim he should be, by so doing, deprived of his right of proceeding against a stranger.

Mr. Justice Ridley said that he was of opinion that the notice of injury served on the plaintiff's employers on May 17 could not be treated as a claim within sec. 2 of the Workmen's Compensation Act. In his judgment the claim

for compensation was the initiatory proceeding, and not the notice of injury. In this case a simple notice had been served on the employers that Perry had been injured while in their employment, but not a word was said to the effect that Perry was going to claim compensation. The notice and the claim must be treated as two different documents. One had to be given as soon as practicable. The other had to be made within six months of the accident. It was sufficient to say that in the absence of a claim for compensation there was no proceeding under the Act.

His Lordship entered judgment for the plaintiff for £225, the amount awarded by the jury.

Solicitors: *Alexander Pope* for the plaintiff, *Leighton & Savory* for the defendant.

See *Powell* v. *Main Colliery Company* ([1900] 2 W. C. C. 29) and *Trenear* v. *Wells & Company* (*post*).

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## TRENEAR *v.* WELLS & CO.

### Before His Honour Judge Stonor.

*The Law Times, July* 28, 1900.

*Claim for Compensation—Meaning—Implied Agreement—Action—* Sec. 2, 1.—Sec. 1, 2, (*b*).—Sec. 1, 3.

A letter containing notice of injury and continuing, "I shall be extremely obliged if you will let me know what compensation you will allow me. An immediate reply will oblige," is a claim for compensation. If the full amount allowed by the Act be then paid weekly and accepted, (1) there is an agreement within sec. 1, 3, and (2) no action can be brought by reason of sec. 1, 2, (*b*).

In the Marylebone County Court, on July 16, 1900, his Honour gave his decision in this case.

*Chester Jones* for plaintiff; *Giveen* for defendants.

His Honour: In this case the plaintiff, a workman in the employment of the defendant firm, met with an

accident on November 22 last, as appears by the following letter from the plaintiff to the defendant firm: "November 24, 1899.—Dear sir,—I was unfortunate to meet with an accident on the Bedford Hotel, Southampton Row, on Wednesday afternoon, 22nd inst., with the result that I have fractured my ribs and broken one, also bruised myself internally; and thus I have to keep my bed for some time. I shall be extremely obliged if you will let me know what compensation you will allow me. An immediate reply will oblige.—I remain, yours truly, Richard J. Trenear." To this letter the defendants returned the following answer: "7-12-1899.—Sir,—We herewith inclose you postal orders for 19*s.* 6*d.* and 3*d.* in stamps on account of your accident. —Yours faithfully, pp. Martin Wells & Co., A. E. G." The defendants subsequently paid to the plaintiff the sum of 19*s.* 9*d.* every week for twelve weeks, amounting to £11 17*s.*, his whole wage, as agreed by counsel, having been 39*s.* 6*d.* a week, and amounting for the twelve weeks to £23 14*s.* At the end of the twelve weeks the plaintiff resumed work at his employers' at full wages, and continued in such employment for several weeks, at the termination of which the job on which he was engaged terminated, and he has now sued the defendants for damages under the Employers' Liability Act. At the hearing on July 2 the plaintiff, in cross-examination, gave the following evidence with reference to the letter of November 24, 1899: "I sent to the defendant firm the letter commencing, 'I was unfortunate to meet with an accident.' I made no suggestion of negligence to the firm, but only to my mates. I gave notice of the accident to my society in February. I knew that the compensation under the Workmen's Compensation Act was half the wages, to commence two weeks after the accident. A fortnight after the accident I was paid half my wages. I made my application under the Workmen's Compensation Act." At the conclusion of the plaintiff's case, an objection was taken by counsel on behalf of the defendants that the plaintiff, having applied

for and accepted compensation under the Workmen's Compensation Act, was by sec. 1, 2 (*b*) of that Act debarred from suing under the Employers' Liability Act; and it was ultimately agreed that this objection should be reserved for the decision of the Court, and that the jury should return a verdict on the action subject to such objection. This the jury accordingly did, and awarded the plaintiff £15 damages. The objection which has been reserved involves three questions: First, did the plaintiff apply to the defendants for compensation under the Workmen's Compensation Act? Second, did the defendants admit such claim? And, third, did both the parties agree to the amount of such compensation? As to the first question, I am of opinion, on the authority of the recent case in the House of Lords—*Powell* v. *Main Colliery Company* (*Limited*) ([1900] 2 W. C. C. 29)—that the letter of November 24 was a sufficient claim under the Act, and would have supported subsequent proceedings under the same; and, on the second and third questions, I think, on the whole, that the letter of December 7, and the payment of the sum of 19*s.* 9*d.* at the date of that letter, and subsequent payments for eleven weeks during the incapacity of the plaintiff, which were the exact sums which would have become payable upon a claim for compensation formally made under the Act, and the acceptance of the same by the plaintiff, constitute sufficient evidence of an agreement by the defendants to admit the plaintiff's claim, and by the plaintiff and the defendants to fix the amount of compensation—which agreement, I think, could have been enforced against the defendants by proceedings under the Workmen's Compensation Act, and possibly at common law. I therefore allow the objection raised by the defendants' counsel, and I shall enter judgment for the defendants, with costs.

See *Perry* v. *Clements* (*ante*).

As to the implied agreement, see *Jones* v. *Great Central Railway Company* (*ante*, p. 50), and the note to that case.

March 13, 1901.

## WRIGLEY *v.* BAGLEY & WRIGHT AND WHITTAKER & SONS.

Before A. L. SMITH, M.R., COLLINS and ROMER, L.JJ.

84 *L. T. R.* 415.

*Work ancillary or incidental to a business.*—SEC. 4.

The sole fact that there is carried on the business of a cotton spinner is evidence that putting a new driving wheel into the steam engine is merely ancillary or incidental to, and is no part of or process in that business.

THIS was an appeal by the applicant from a decision of the Judge of the Oldham County Court in proceedings to recover compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of Joseph Wrigley, who was accidentally killed on September 2, 1900.

The claim was brought in the alternative against two sets of respondents. The first-named respondents, Messrs. Bagley & Wright, carried on business as cotton manufacturers at Wellington Mill, Oldham.

They entered into a contract with the other respondents, Messrs. Whittaker & Sons, who carried on business as engineers, by which Messrs. Whittaker & Sons contracted to put up a new fly-wheel to an engine in Messrs. Bagley & Wright's factory.

The deceased, who was an operative millwright, was employed by Messrs. Whittaker & Sons to assist in lifting the fly-wheel into its position. The tackle by which this operation was managed was furnished by Messrs. Whittaker & Sons. It consisted of blocks and a winch which was turned by hand, and it was in the course of carrying out this operation that the accident happened which resulted in the death of the deceased.

The County Court Judge said in his notes: "I found as a fact that the pulleys and winch did not constitute 'machinery driven by steam, water, or other mechanical power.' I was of opinion that the driving power in this case was hand power, and not mechanical. The force driving or operating the machine is in my opinion something external to the machine, and here it was human power or force, not mechanical power or force. On the point under sec. 4, I found as a fact that repairing the engine was merely ancillary or incidental to the trade or business of cotton manufacturers, and was no part of or process in that trade or business."

He therefore gave an award in favour of both respondents.

The applicant appealed.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) provides:

Sec. 4.—Where in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

Sec. 7.—(1) This Act shall apply only to enployment by the undertakers as hereinafter defined on or in or about a railway, factory, mine, quarry, or engineering work . . . (2) In this Act "engineering work" . . . includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used: "undertakers" . . . in the case of a factory means the occupier

thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895 . . . and in the case of an engineering work means the person undertaking the construction, alteration, or repair. . . .

*Joseph Walton*, K.C., and *Montefiore* for the applicant: The accident undoubtedly occurred in the course of the deceased's employment in a factory. But in view of a decision of this Court last year, it would be useless for the applicant to contend here that Messrs. Whittaker & Sons were the "occupiers" of the factory, and therefore "undertakers" within sec. 7: *Francis* v. *Turner Brothers* ([1900] 2 W. C. C. 61). The next question that arises with regard to Messrs. Whittaker & Sons is whether the deceased was employed "on or in or about an engineering work." The winch by which the operation on which the deceased was employed was being carried out was moved by hand power, and in view of the findings of the County Court Judge it seems useless to contend now that the work was "engineering work" within sec. 7. The next point is with reference to Messrs. Bagley & Wright. They were the occupiers of this factory, and therefore "undertakers" within sec. 7. It is clear that under the first part of sec. 4 they are liable to pay compensation in this case. The only difficulty arises under the last sentence in that section. Does that sentence relieve them from the liability imposed by the preceding words? We submit that it does not. The engine was an essential part of the cotton factory, because by it all the machinery used in cotton spinning was kept in motion. The oiling and keeping the engine running is a part of the business carried on by Messrs. Bagley & Wright. That is not "merely ancillary and incidental to" the business. It is a necessary part of the business of cotton spinning. The repair of the engine is the same sort of thing as keeping the engine running and in proper working order. The engine is really the thing that does the work which is carried on in the factory. They cited *Pearce* v. *London & South-Western Railway Company* ([1900] 2 W. C. C. 47).

*Rowlatt* for the respondents Bagley & Wright, and *Ruegg*, K.C., and *F. H. Mellor* for the respondents Whittaker & Sons, were not called upon.

SMITH, M.R.: The claim for compensation in this case has been made against two persons in the alternative. One of those persons was the firm of Whittaker & Sons, who carried on business as engineers, and who were the persons with whom the deceased workman had entered into a contract of employment. But the learned counsel who appeared for the applicant in this Court said that he felt unable to argue that Whittaker & Sons were "undertakers" within sec. 7 of the Workmen's Compensation Act, 1897, so as to be liable to pay compensation under that Act in respect of the accident which caused the death of deceased. The other persons against whom, in the alternative, the claim for compensation was made are Messrs. Bagley & Wright. The deceased had not entered into any contract of employment with them, so that it is clear the applicant has no claim against them under this Act unless it can be shown that they come within the provisions of sec. 4. It is also clear to me that under the first paragraph Messrs. Bagley & Wright would be liable to pay compensation, but that paragraph must be read subject to the proviso contained in the last paragraph of the section which provides that the section "shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively." The question therefore is whether this proviso relieves Messrs. Bagley & Wright from the liability to pay compensation which is imposed upon them by the first paragraph of the section. The work upon which the deceased was engaged when the accident happened which caused his death was the putting up of a new fly-wheel to an engine in a factory belonging to Messrs. Bagley & Wright, who carried on in that factory the business of cotton spinners. The County Court Judge said

that he "found as a fact that repairing the engine was merely ancillary or incidental to the trade or business of cotton manufacturers, and was no part of or process in that trade or business." I do not think that the putting up of this new fly-wheel is a part of the process in the trade of cotton spinning, which is the business carried on by Messrs. Bagley & Wright. I cannot say that the learned County Court Judge was wrong. On the contrary, I think he was right. I do not think that as regards Messrs. Bagley & Wright the case has been brought within the proviso at the end of sec. 4, and the appeal ought therefore, in my opinion, to be dismissed.

COLLINS, L.J.: I am of the same opinion. So far as regards the claim against Messrs. Whittaker & Sons, the applicant's case fails, as Mr. Joseph Walton has admitted, on two grounds. First, Messrs. Whittaker & Sons were in no sense the "undertakers," within sec. 7, of the factory in which the work was being done on which the deceased was employed at the time of the accident. Messrs. Whittaker & Sons were merely employed to do certain work in a factory which belonged to Messrs. Bagley & Wright. Secondly, the point as to "engineering work" is met by the difficulty that no "machinery driven by steam, water, or other mechanical power" was being used. That disposes of the applicant's claim as against Messrs. Whittaker & Sons. The claim against Messrs. Bagley & Wright turns upon the provisions of sec. 4. The state of facts which that section is meant to deal with is this: When a person who is himself an "undertaker" in respect of a particular class of business substitutes for himself, by way of contract, somebody else to do the work of that business, then the workmen in the employ of that substituted person have the same rights against the original "undertaker" as if they were directly in his employ, and he had done his own business himself. The common sense and justice of that are plain. If a man contracts with another person to do that which it is his own main business to do, it is only

fair that the workmen employed should have the same rights against him which they have against their actual employer. But it is obvious that that enactment would be too general without a proviso, the object being to restrict the liability of the original "undertaker" to those persons whom he would have himself employed if he had not made the contract with somebody else to do his work for him. Therefore the Legislature put in this proviso, so that it might not be supposed that any liability was to be put upon the "undertaker" in a case where the substituted person is not undertaking the doing of anything which is the main business of the original "undertaker," but is only undertaking the doing of something which is merely ancillary or incidental to, and no part of or process in, the trade or business carried on by such undertaker. Not long ago we had in this Court a very good instance of work that was merely ancillary. That was the case of *Pearce* v. *London & South Western Railway Company* (*ubi sup.*), in which a railway station was being erected for a railway company by a contractor, and we held that the erection of the station was merely ancillary to, and was no part of, the trade or business of a railway company. But I think the present case is also a very good illustration of work which is merely ancillary to the main business carried on by an "undertaker." Putting a new fly-wheel, in substitution of an old one, into machinery used for the purposes of a cotton factory does not appear to me by any possibility to be capable of being described as a process in the trade or business of cotton spinning. For these reasons, therefore, I agree with the decision of the County Court Judge.

ROMER, L.J.: I agree. Messrs. Bagley & Wright are cotton spinners. It is no part of the business of cotton spinners, and no part of a process in that business, to erect a fly-wheel to an engine any more than it is to erect the building in which they may carry on their business.

Appeal dismissed.

Solicitors for the applicant, *Mills, Lockyer, & Mills,* for *D. E. Griffiths,* Oldham.

Solicitors for Messrs. Bagley & Wright, *Field, Roscoe, & Co.,* for *G. P. Fripp,* Oldham.

Solicitors for Messrs. Whittaker & Sons, *R. B. Wheatly, Son, & Daniel,* for *Cobbett, Wheeler, & Cobbett,* Manchester.

Also reported (1901) 1 Q. B. 780; 70 L. J. K. B. 538; 84 L. T. R. 415; 49 W. R. 472; 65 J. P. 372.

This case is under appeal.

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March 9, 1901.

## M'GRATH *v.* NEILL.

Before His Honour JUDGE PARRY.

*The Law Times, March* 9, 1901.

*Height of Building—Measurement—Street Level—Basement—Foundation.*—SEC. 7, 1.

To ascertain the height of a building, measurement should be taken from the lowest brick or stone, or from its foundations, other than concrete or rubble.

IN the Manchester County Court, on February 21, Christopher M'Grath, bricksetter, Alliance Street, Harpurhey, took proceedings against his employers, Messrs. R. Neill & Sons, building contractors, for compensation in respect of an injury sustained while working on some warehouses that were being erected in Hilton Street.

*McCleary,* for the applicant, argued that the height should be measured from the commencement of the building. This would either be from the bottom of the foundations or, if the height of the wall was the test, from the top of the footings, and he quoted the bye-laws of the Manchester Corporation and other municipalities, which defined the height of the building as the height from the top of the footings.

*Percy H. Jordan*, solicitor, contended for the respondents that what the Legislature had in mind in fixing 30 feet was the danger to the workmen employed on such buildings, and therefore the height should be measured from the street level or, at the lowest, the cellar floor.

His Honour: In this case I have to decide how a building should be measured under sec. 7 of the Act. The words of importance in the section are:—"This Act shall apply only to employment by the undertakers . . . on, in, or about any building which exceeds 30 feet in height." The question for consideration is, When is a building 30 feet in height? The first thing to consider is why the Legislature introduced the 30-feet test. It has been suggested that risk to workmen was the sole reason. I do not think so; for I note that a man "about" a 30-feet building is within the Act, although the risk of being "about" a 30-feet building can scarcely be greater than being "about" a smaller building. It seems to me also that, if risk had been the consideration in the mind of the Legislature, and risk only, 20 feet, 15 feet, or even 12 feet would have been the measure taken, for there experience of building accidents shows us that risk begins. I am the more inclined to this view because I find the words about the building 30 feet high in sec. 23 of the Factory and Workshop Act, 1895, and in the schedule of the Notification of Accidents Act, 1894, where clearly they refer to the class of building undertaken rather than to the risk by the workman. I think, therefore, the real view of the Legislature in choosing 30 feet was to make large builders and contractors liable, and to keep outside the Act a poorer and smaller class of builder, whose work lies in cottage and other small property, which rarely reaches a height of 30 feet, however measured. In this case the four following measurements were practically agreed upon after the evidence had been given, and I find them as facts. The applicant sought to prove a brick course or two above the second-floor joist, but I found against him, and the second-floor joist is the highest point

of the building. These are the measurements: (1) From footing to second-floor joist, 33 feet 2½ inches; (2) from top of footing to second-floor joist, 31 feet 2½ inches; (3) from basement floor to second-floor joist, 29 feet 10 inches; (4) from level of street to second-floor joist, 23 feet 5¾ inches. There is a possible difference of 2 inches less than these measurements, but I think the above are the correct measurements. Taking them in the reverse order, ought I to measure from the street level (4)? In my view the object should be to obtain a bottom point from which to measure which is capable of being found with certainty, which, when a principle of measurement is laid down, will leave nothing for employer and workman to do but to take a 2-foot rule and find out whether the building is within the Act or not. The street level does not give me such a bottom line from which to measure. No street is absolutely level; many are on very distinct slopes; a building may be surrounded by different streets on different levels. A building in the country may have no street level, and part of the scheme of such a building may be to alter the ground level by which it is to be surrounded. Edinburgh Castle was suggested as a building almost impossible to measure from a street or ground level with any chance of opposing litigants agreeing in their measurements. Many other more normal buildings would present similar difficulty. I therefore rejected this proposal as unsuitable for want of certainty and precision, and as being an encouragement to litigation which the Act could not be taken to intend. No. (3) measurement is from the basement, and for similar reasons this seems an unsuitable bottom line to measure from. The basement of a building in course of construction is often full of *débris*, trenches may be dug in it, and at no place has it in most buildings a uniform level. The actual basement does not therefore seem to give me the certain definite measurement I am in search of. Either of the measurements (1) and (2) seem to me to comply with the words of the Act, and to give me a definite measurement.

I think No. (1) is the right measurement. I should find the highest point a building has attained and the lowest brick of actual building, and the difference between the two is the height of the building. If, in fact, as it is in this case, there has been more than 30 feet in height of building, it seems to me wrong to say that it is not a "building which exceeds 30 feet in height." In my view a building exceeds 30 feet in height when it is 30 feet from its lowest brick or stone, or from its foundations. I should not take into consideration of height of a building a foundation of concrete or rubble, but I should always measure from the lowest brick, and pay no heed to street levels, basements, or trenches in which the building was placed. As soon as building work attains a height of 30 feet, then, in my view, the building is 30 feet high. Measurement (2) was taken because it was suggested that the footing itself was not really building, but foundation. I do not myself concur in that view. If I am right in this decision, these are definite points of measurement top and bottom, which leave little room for litigation and dispute, and seem to me in harmony with the intention of the Legislature. I find, therefore, this building exceeded 30 feet in height, and the applicant is entitled to 9*s.* 5*d.* a week and costs, C scale.

This case is under appeal.

For cases on this subject, see Vols. I. and II.

January 8, 1901.

## KNIGHT *v.* CUBITT.

Before His Honour DEPUTY JUDGE CLEMENT LLOYD.

*Building—Height—Originally exceeding 30 feet—Nearly demolished—Party Wall left standing—Work not merely Ancillary—Builders—Demolition*—SEC. 4.—SEC. 7, 1.

A building originally over 30 feet in height had, with the exception of a party wall over 30 feet in height, which was to be left standing, been nearly demolished.

*Held* that it was a building over 30 feet in height.

A large firm of builders entered into a contract, in the usual course of their business, to pull down and rebuild a house. It was their invariable custom to contract with housebreakers for the demolition; they never had anything to do with the premises until ready for building operations.

*Held* that the firm were persons "undertaking" the demolition of the house, and that demolition was part of, and not merely ancillary or incidental to their business.

THIS case was heard at the Brompton County Court, January 8, 1901.

*E. Brown* for the applicant.

*Minton-Senhouse* for the respondents.

On February 18, 1901, the award was made in the following terms:—

In this case the applicant is the widow of a workman named Knight, who also left three young children surviving him. It appears that the respondents, who are the well-known builders, entered into a building agreement with Messrs. Woolland whereby they agreed to demolish and reconstruct two houses, Nos. 16 and 17, William Street. In accordance with what was stated to be their invariable practice, the respondents did not proceed with the work of demolition themselves, but sublet it to a housebreaker named Clements, who has been brought into these proceedings as a third party under R. 19. Before the work of

demolition commenced both of the houses in question exceeded 30 feet in height. The deceased workman, Knight, was employed by Clements in pulling down No. 17, and on August 1 last, whilst so employed, met with an accident which subsequently proved fatal. At the time of the accident the part of the building upon which Knight was working was reduced to the height of about 11 or 12 feet above the street, but the party wall between the two houses was intact. Previously to the accident, Knight had been employed in the work of demolition for 5½ days, at the rate of 35*s.* a week. No evidence was tendered at the hearing of the height of the building at the commencement of his employment. Mr. Minton-Senhouse, on behalf of the respondents, contended in the first place that No. 17 was not at the time of the accident a building within the meaning of the Act, as the part which was in course of demolition, and on which Knight was working, did not exceed 30 feet in height, and in support of this contention relied on the case of *Billings* v. *Holloway* ([1899] 1 W. C. C. 59), when it was held that a building in course of erection which did not exceed 30 feet in height, but was intended to exceed that height, was not within the Act. But I do not think the converse necessarily applies, as, whatever the height of the building at the time of the accident, a building of the required height was in course of demolition, whilst in the case relied on the building in question had not and might never have reached the height. In the present case, moreover, the party wall, which is certainly a part of the building, was intact, a fact which, in my opinion, further distinguishes it from *Billings* v. *Holloway*, and clearly brings it within the Act. The case of *Rixsom* v. *Pritchard* ([1900] 2 W. C. C. 65) was also cited, but I do not think that it has any application to the present case. On behalf of the respondents the further point was taken that they were not "undertakers" within the meaning of sec. 7, as the work sublet by them to Clements was merely ancillary to the business carried on by the respondents, and the learned

counsel referred to *Pearce* v. *L. & S.W.R. Co.* ([1900] 2 W. C. C. 47); but I cannot agree with this contention, as the respondents' agreement with Woollands was both to demolish and to reconstruct, and they sublet the former part of their undertaking to Clements, who thus became a sub-contractor for the execution of work which, if executed by workmen immediately employed by the respondents, would have rendered them "liable to pay compensation under the Act to those workmen in respect of any accident arising out of or in the course of their employment." I think, however, that the respondents are entitled to be indemnified by Clements as coming within the proviso contained in sec. 4 of the Act. With regard to the amount of compensation to be awarded in the event of the award being in favour of the applicant, it was contended by Mr. Minton-Senhouse that, having regard to the fact that Knight had only been employed for 5½ days, his average weekly earnings were not 35*s.*, but only half that sum, in other words, that the 35*s.* must be spread over two weeks before an average could be struck; but I am unable to agree with this contention, and think, according to the provisions of sched. 1 (1) (*a*) (i.), Knight's average weekly earnings should be taken to be 35*s.* I therefore assess the amount of compensation to be paid by the respondents at £273, and award that sum to the applicant, with costs, the £273 to be apportioned as follows: £100 to be paid to the applicant, and the remaining £173 to be divided between the three children, and invested in the Post Office Savings Bank by the Registrar, and the interest paid to the applicant, with liberty to apply.

For the respondents were quoted the *dicta* of Lord Lindley in *Hoddinott* v. *Newton, Chambers, & Co.* (*post*, p. 102), that the provisions in the Act relating to the height of a building referred to the time of the accident, neither before nor afterwards.

This decision is under appeal.

December 10, 1900.

# HODDINOTT *v.* NEWTON, CHAMBERS, & CO.

## Before LORDS MACNAGHTEN, MORRIS AND KILLANIN, SHAND, DAVEY, BRAMPTON, and LINDLEY.

84 *L. T. R.* 1.

*Construction or Repair—Scaffolding.*—SEC. 7, 1.

Strengthening a finished building because it is considered to be unstable is a work of construction or repair of the building. (*Hoddinott* v. *Newton, Chambers, & Co.*, (1900) 2 W. C. C. 62, overruled on this point, Lords Shand & Lindley *diss.*)

Scaffolding may be external or internal.

Scaffold boards 8 feet high from the ground, resting on ledges secured to iron columns, and supported in the middle by trestles, all within a building, amount to evidence of scaffolding.

A building may be partially constructed or repaired whether much or little be done (per Lord Macnaghten).

A building is being constructed whenever new material is put into it so that it becomes an integral part of the structure (per Lord Macnaghten).

Construction, repair, demolition—these three operations cover every varying phase of the life of a building from its beginning to its end (per Lord Macnaghten).

Whether a certain arrangement amounts to a scaffolding within the meaning of sec. 7 is a question of law upon the findings of fact (per Lords Macnaghten and Brampton) as to, for instance, the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place, and the size of the place in which it is used and the dimensions of it (per Lord Brampton).

The provisions of the Act relating to height and to the use of scaffolding refer to the time of the accident, and not to any time before or afterwards (*Obiter dicta* per Lord Lindley).

*Hoddinott* v. *Newton, Chambers, & Co.* ([1900] 2 W. C. C. 62) reversed, Lords Shand & Lindley *diss.*; *Wood* v. *Walsh* ([1899] 1 W. C. C. 68), *Maude* v. *Brook* ([1900] 2 W. C. C. 69), *Ferguson* v. *Green* (p. 113) considered; *Billings* v. *Holloway* ([1899] 1 W. C. C. 59), approved by Lords Brampton and Lindley.

THIS was an appeal from a judgment of the Court of Appeal (Smith, Collins, and Romer, L.JJ.), reported (1899) 1 W. C. C. 62, who had set aside an award made by the

County Court Judge of Wandsworth under the Workmen's Compensation Act, 1897.

The facts appear fully from the judgments of their Lordships.

*Ruegg*, Q.C., *Moyses*, and *Holland Biggs*, for the appellant, argued that the Court of Appeal had held correctly that this was a building more than 30 feet high, and that the erection from which the deceased fell was a "scaffolding" within the meaning of the Act, but held that alterations to a building already constructed were not "construction or repair" within the meaning of the Act, and that therefore the applicant could not recover. This was wrong. Either this work was a "construction" which ought to have been done when the building was erected, or else it was "repair." The words of the Statute were meant to cover all building operations. As to the meaning of the Act, see *Billings* v. *Holloway* ([1899] 1 W. C. C. 59), *Wood* v. *Walsh* ([1899] 1 W. C. C. 68). The words as to the height of the building and the use of scaffolding appear to be taken from the schedule to the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), and sec. 23 of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37). As to who is an "undertaker," see *Mason* v. *Dean* ([1900] 2 W. C. C. 91). "Scaffold" and "scaffolding" are the same thing. The matter was discussed in *Maude* v. *Brook* ([1900] 2 W. C. C. 69); but in the later case of *Ferguson* v. *Green* (*post*, p. 113), where, on facts very similar to *Maude* v. *Brook*, the arbitrator found as a fact that the erection was not a scaffolding, the Court refused to disturb his finding.

*Bray*, Q.C., and *Spencer Bower*, for the respondents, contended that the words must be taken in their ordinary meaning. This was not the construction of a building more than 30 feet high by means of a scaffolding. Some improvements were being effected in a building already constructed. What the Legislature was dealing with was the construction or repair of a building as a whole, not a mere alteration, which is deliberately omitted, though it

appears in relation to engineering work. This erection was not a "scaffolding" in the ordinary sense of the word, neither could the operation be called "repair."

*Ruegg*, Q.C., was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

*December* 10.—Their Lordships gave judgment as follows:—

LORD MACNAGHTEN: My Lords. The claim in this case, as presented to your Lordships, is a claim under the Workmen's Compensation Act, 1897, for compensation in respect of an accident to a workman. It seems that about six months before the date of the accident the London General Omnibus Company took over a building which had been erected for them. They have used it as stables ever since. It may be assumed, I think, that the building was erected in accordance with the specifications prepared on behalf of the company, and that at the time when it was taken over nobody contemplated that anything further in the way of construction would be required. However, when the stables came to be used it was found that there was some vibration, and the company determined to have the building stiffened. Accordingly, they engaged the respondents, who are ironwork contractors, to put in some heavy iron stays, weighing about one hundredweight apiece, between the girders and the pillars which supported the building. The appellant's husband was employed by the respondents on the work. In the course of his employment he met with an accident. He slipped and fell off a temporary staging while helping another workman to lift one of these iron stays. The stay fell upon him, and he was crushed to death. The County Court Judge dismissed an action which was brought by his widow against the respondents claiming damages for negligence, and then proceeded to assess compensation under the provisions of the Act of 1897. The Court of Appeal set aside his order, being of opinion that the Act did not apply to the employment in

which the deceased was engaged. The Workmen's Compensation Act is of limited application. Sec. 7, so far as material to the present question, is as follows: "7.—(1) This Act shall apply only . . . to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding or being demolished. (2) In this Act, 'undertakers' . . . in the case of a building means the persons undertaking the construction, repair, or demolition. 'Workman' includes every person who is engaged in an employment to which this Act applies. . . ." The learned Judges of the Court of Appeal agreed with the County Court Judge in holding that the building exceeded 30 feet in height. They were not agreed on the question whether the staging erected for the purpose of the work in hand was "a scaffolding" within the meaning of the Act. Smith, L.J., without expressing any opinion of his own, thought there was evidence sufficient to justify the finding of the County Court Judge to that effect. Collins, L.J., took a different view. Romer, L.J., did not attempt to determine the point. All the learned Judges, however, concurred in holding that the building in which the accident happened was not at the time being constructed or being repaired, and that the respondents were not undertakers within the meaning of the Act. The ground of their decision is stated very clearly by Smith, L.J. "Were the ironfounders," he asks, "who put in these stays constructing the building? That cannot be," says his Lordship, "for it had already been constructed, and what was then being done was only an addition to that which it had originally been contemplated would be wanted. How can it be said that the deceased was employed on a building which was being constructed? The construction was at an end, but some strengthening was afterwards needed to be done." Collins, L.J., as it seems to me, went rather further, following out the views expressed by the other members of the Court to their logical

conclusion. He thought that the only work contemplated by the Act in the case of a building besides demolition was construction or repair of the building "as a whole." The argument addressed to your Lordships by the learned counsel for the respondents followed the same lines. The building, they said, when it was handed over, was complete according to the original design. Construction, therefore, necessarily was at an end. What was done afterwards, whether it was the result of caprice on the part of the company's engineer, as they suggested, or a *bonâ fide* attempt to make the building more suitable for the purpose for which it was intended, was only an alteration, or at the most an addition, and perhaps an improvement. It was not either construction or repair. I do not think that it advances the argument to call the work an alteration, or an addition, or an improvement. I should suppose that any one of those terms might be applied to it properly enough. The question as it seems to me is this: Was the work—the thing that was actually being done—a work of construction or a work of repair, or something which was neither the one nor the other, neither construction nor repair? It seems a strong thing to say that when a building is once completed according to the original design you cannot have anything further in the way of construction unless the work be of such a character as to make the building practically a new building. That, however, was the argument. But the Act, it will be observed, uses the word "construction," not the word "erection." It speaks of a building "being constructed," not of a building "being erected." And it couples construction with repair. Now, repair, as the word is commonly understood, is repair whether much is done or little. Repair for the most part is occasional and partial. A man does not usually wait to repair his house until it is altogether ruinous and on the point of falling to pieces. Why may not construction be partial just as repair is partial? Many cases were put in argument, and many others may

be suggested. Is a man who adds a storey or a new room to a house constructing a building? Is a man constructing a building if he strips off a coating of stucco and faces his house with red brick or cut stone? In one sense he is, in another sense he is not. It depends upon what is meant by "constructing," and whether reference is made to the building as it was, or to the building as it will be when the proposed alteration is complete. These and such-like questions may be very interesting puzzles, but I do not think that they help one much. The question after all must be what is construction and what is repair in this Act of Parliament, where construction and repair are associated together? I do not think that "construction" can be limited to the original construction. That would be in effect substituting "erection" for "construction." Nor do I think that "construction and repair" can be limited to the construction of a building "as a whole." Neither the word "original," which the learned counsel for the respondents so continually interpolated, nor the words "as a whole," which Collins, L.J., would introduce, are to be found in the Act. They are glosses, and I think misleading. It seems to me that whenever new material is put into a building so that it becomes an integral part of the structure you have something in the nature of construction, and that a building which is being so treated is being constructed within the meaning of the Act. You are putting together the old materials and the new. Now, if this be "construction," I do not think that it can matter in the least whether the work is taken in hand immediately after the erection of the building or not commenced until months or even years later. Nor do I think it of importance to inquire why the work has been undertaken. It cannot, as it seems to me, make any difference whether the person who gave the order for it was moved by a reasonable apprehension of danger or prompted by some idle fancy. What has to be looked to is the thing done, not the motive for doing it, or the

relative dates of the erection of the building and its subsequent alteration. Construction, repair, and demolition —these three operations cover, I think, every varying phase in the life of a building from its beginning to its end. I prefer to rest my judgment on this broad ground. But I cannot help thinking that something narrower would lead to the same result in the present case. May one not say with the strictest propriety that a building is in course of construction when it is being reconstructed in order to make it what it was intended to be—a firm and substantial structure capable of resisting the action of the wind? Reconstruction is but construction over again. The learned counsel for the respondents sought to draw an inference in their favour from the circumstance that the word "alteration" occurs in connection with engineering work, but not in connection with buildings. I should suppose that in the latter case it was omitted designedly, because it is impossible to conceive any alteration in a building—that is, of course, any substantial alteration—which does not involve construction. In the case of engineering work it is very different. If you look at the definition of engineering work, that may include shifting of rails, alteration of points, change of levels, and many other things which no one would ordinarily call construction or repair. There was one point made by the learned counsel for the respondents which ought, I think, to be noticed. The learned counsel did not contend that the arrangement of boards and ledgers and trestles, which for want of a better word I have called a staging, was not a scaffolding in the common acceptation of the word; everybody called it a scaffolding. But they argued that it was not such a scaffolding as was contemplated by the Act. Taking the view which commended itself to Collins, L.J., both in the present case and in *Maude* v. *Brook* ([1900] 2 W. C. C. 69), they said that the "scaffolding" must have some relation to the height of the building. And when pressed to submit a more definite proposition they

proceeded to contend that it must be a scaffolding adequate for the construction or repair of a building exceeding 30 feet in height "as a whole," or, to use the language of the Lord Justice in *Maude* v. *Brook*, "one system of scaffolding for the whole building which is capable of being used for its construction or repair as a whole." That might have been a reasonable provision if the accidents to which the Act applies had been confined to accidents in some way connected with the use of the scaffolding. But it is not suggested that anything of the sort is to be found in the Act. All that the Act requires is that there should be a building exceeding 30 feet in height, which is being constructed or repaired by means of a scaffolding. It says nothing about the height or position or extent of the scaffolding. It is not, I think, for the Court to lay down conditions which Parliament has not thought fit to impose. I ought, perhaps, to add that I agree with Lord Brampton, and with Collins, L.J., in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the County Court Judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion. The provision as to the height of the building and the provision with reference to a scaffolding serve roughly to draw a line of demarcation between employments with which the Act is not concerned and those to which it is intended to apply. They were intended to exempt a certain class of buildings, and, perhaps, a certain class of builders of the humble sort, from the operation of the Act. They are obviously copied from the Factory and Workshop Act, 1895, where the same provisions serve a somewhat similar purpose. I do not think that they throw any light on the construction of the Act. I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification,

and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be. But I think that in the present case the learned Judges of the Court of Appeal have taken too narrow a view. If you construed the words of the Act so narrowly as to exclude one of the commonest operations of the builder, the alteration of buildings once completed, and so debar workmen engaged in that operation from all benefit of the Act, you are, I venture to think, violating the letter as well as the spirit of the enactment. I think that the appeal ought to be allowed with costs in the Court of Appeal, and with such costs in this House as are allowed in pauper cases, and that the order of the County Court Judge ought to be restored, and I move your Lordships accordingly.

Lord Morris and Killanin: My Lords. I agree in the judgment of Lord Macnaghten, and in the reasons which he has given. That the building exceeded 30 feet in height, and had some operations performed on it by means of scaffolding, are questions of fact mainly, and were found in the affirmative by the County Court Judge, and not dissented from by the majority of the Court of Appeal. Nothing, in my opinion, remains but the question, Was the operation being performed on the building at the time of the accident either constructing or repairing the building? In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing, repairing, or demolishing. Alteration in its construction is, in my opinion, construction. I can find no reference in the Statute to what is called a completed building in the judgment of Smith, L.J. In my opinion, whether completed or not completed, if work of the nature of construction goes on, that is constructing, and if work of the nature of repair, that is repairing, and there is no room for any third operation of so-called alteration as distinct from constructing or repairing.

LORD SHAND: My Lords. The question for the decision of the House in this appeal is whether when the deceased Benjamin Hoddinott lost his life the respondents were engaged in the construction or repair of the building in which the accident occurred, or whether the work then being done was of the nature of an addition to or alteration of a building, the construction of which had been completed about six months previously, the addition or alteration not being construction or repair, as referred to in sec. 7 of the Workmen's Compensation Act, 1897. That the question is one of difficulty sufficiently appears from the division of opinion in your Lordships' House. I have come to the conclusion that the judgment of the Court of Appeal is right, and ought to be affirmed. The Statute, in sec. 7, draws a marked distinction between employment in engineering work and in the construction of a building, and in construing the Statute the distinction is of importance to the decision of the case. In the opening part of that section the Act is declared to apply to "engineering work," and also to employment about any building which exceeds 30 feet in height, and is either "being constructed or repaired by means of a scaffolding or being demolished." In the same section engineering work is defined or described to mean "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer," or the other works there enumerated. Again, under the description of undertakers in the case of an engineering work, the term means "the person undertaking the construction, alteration, or repair," and in the case of a building means the persons undertaking the construction, repair, or demolition. Within the provisions of sec. 7 of the Statute, on the meaning of which the whole question in dispute turns, in three different passages engineering work is thus defined to include, not only construction or repair, but "alteration," while in contrast with this, in the case of a building, the definition twice repeated includes construction or repair only. The

work by way of "alteration" is not included. It must, in my opinion, especially having in view the juxtaposition of the provisions, be taken to have been designedly intended to create a distinction between the two classes of work. It is more than doubtful whether the question really in dispute, as it has been argued in the Court of Appeal and again in this House, was clearly before the learned Judge of the County Court. The claim which was made under the Employers' Liability Act of 1880, which failed, suddenly became before him a claim under the Workmen's Compensation Act of 1897, under which he came to act as arbitrator. It is recorded by him in his notes that the Court holds: "The defendants were undertaking the construction, alteration, or repair." If the case was one of alteration only of an existing construction, it does not follow that the circumstances would create the liability insisted on, because that word is not in the Statute applied to a building. The finding seems to show that the learned arbitrator could not hold the case as one in which there was "construction," which inferred liability under the Statute. As to the question of repair, I say that it is out of consideration, for, whatever was being done at the building, there was no repair going on. None of the completed work had gone wrong or given way so as to require any repair or setting right in itself; and what was done was, therefore, no act of repairing, but something entirely new. The question remains, and it seems to me the only question in the case, Was the building in the course of construction? There was little, if any, evidence given as to the facts bearing on that question, apparently because the appellant's case was really presented as one, under the Employers' Liability Act, of fault or negligence on the employer's part from alleged defective scaffolding. The evidence taken before the coroner seems to have been put in, and there a witness said that the alteration to the building was to stay the building, "so that the wind may not vibrate it." Accordingly, the facts beyond this statement

must be taken from the admissions made before the Court of Appeal. These admissions are really part of the appellant's case, for they are necessary to raise the question of liability, as well as to give the grounds on which the Court of Appeal proceeded in holding that the Statute did not apply; and Mr. Ruegg, in his able argument, candidly admitted the facts on which the Court of Appeal in their judgment proceeded. These facts are—first, that the building had been completed and in use for somewhere about six months before the accident occurred; secondly, that the work then being carried on was not contemplated when the building was constructed; thirdly, that the iron stays were being put in to strenghten or stay the building and prevent vibration; and fourthly, that the appellants, who had not been employed in the construction of the building, were employed in putting in the stays. In this state of the facts I am of opinion, with the Court of Appeal, that the case is not within the provisions of sec. 7 of the Statute, as the building was not "being constructed by means of a scaffolding." It was a building which had been so constructed months before, and had been in use as a completed building, on which an improvement or an addition only was being made. What is the distinction which the Statute has drawn between engineering work and buildings? As I have said, the former includes construction, alteration, or repair; the latter only construction and repair; and repair being out of the case, "construction," which seems to me equivalent in meaning to "erection," only remains. If the word erection had been used, the appellant's argument would have been the same—that the placing of stays was erection in part, as it is now said to be construction of a part of the building. This was a constructed building, long in use, to which it was thought desirable to make an improvement or addition, to make it more secure or more comfortable. Is it to be said that every such improvement or addition, where scaffolding is in use in the building, is "construction" of a building within

the meaning of the Statute? I cannot give to the term "construction" so wide, I might say so loose, a signification. The work might be the putting in of one or more windows in order to light the building better, or it might be the making of commodious presses, internal presses or closets, or the making of a closet or lavatory arrangements by internal work. It appears to me that such additions, alterations, or improvements in a building cannot be regarded as "construction," and I say the same in regard to stays put in in order to prevent vibration. The erection of a new or additional story to a building might be represented as construction, because in that case a new building, including an outside structural wall, is really made or constructed; but that entirely differs from such internal operations as occurred in the present case, and the character of the addition, improvement, or alteration, in my opinion, makes all the difference. The argument of the appellant disregards the distinction which the Statute has drawn between engineering work and work on a building. It has been observed that the word "alteration" may have been omitted designedly, because it is impossible to conceive any alteration in a building which does not involve construction. The observation would, it appears to me, apply with the same force to a "railroad, harbour, dock, canal, or sewer" in which engineering work may be employed. The use of the term "construction" was not deemed sufficient to include in that case work of the nature of an alteration, and accordingly that term was added, and I am unable to construe the term "construction" in a wider sense when it is used as applied to a building, so as to include everything of the nature of an improvement or addition than the proper sense in which it is used as applicable to engineering works in the same sentence. It was argued for the appellants that if a case of repair, and it might be of comparatively small repair, is sufficient to bring the building within the Statute, why should not an improvement or addition also have the same effect? The

answer to that observation is that the Statute in its terms has drawn and enacted a distinction between the two cases. For my part, I agree in thinking that the distinction ought to be done away with, and that cases of alteration should be put on the same footing as those of repair; but this must be done by amending legislation, and not by straining the language used so as to include cases which it may seem desirable to include, though the terms used will not, according to their ordinary and proper interpretation, do so. I agree in thinking that the staging from which the deceased fell was a scaffold or scaffolding within the ordinary meaning of these words, and that it was so seems to be simply a question of fact. I further agree with Lord Macnaghten that, as a matter of law, the erection and use of a scaffold or scaffolding "capable of being used for the construction or repair of the building as a whole" is not required in order to bring the building under the provisions of sec. 7 of the Statute.

Lord Davey: My Lords. I agree with Lord Macnaghten, and I only desire to add two observations of my own. This case is, of course, not free from difficulty, but I have come to a clear opinion that the addition of these iron stays was "construction" within the meaning of the Act. Smith, L.J., says it was not construction, because the building was already completed. I take leave to say that the learned Judge assumes the whole point in controversy. No doubt it was intended to be completed, and the parties thought that it was completed when the omnibus company took possession. But the experiences of a few months showed that something more was needed to adapt it to the purpose for which it was intended, or, in other words, that was not in fact complete; and the addition of these iron stays was required to complete the construction. It is none the less construction because it was an addition made at a later date, or because the addition was not contemplated or was omitted in the original specification, and the necessity for it was not then apparent. The

second observation is as to the construction put by Collins, L.J., on the words of the Act. The learned Lord Justice says that the scaffolding must bear some relation to the height of the building, and be such a scaffolding as would be required to construct or repair a building of that height. I think it very likely that the draftsman had something of that kind in his mind, but I can only interpret the Act by the language which he has used. The Lord Justice further says that the requirement of a building of a certain height and of a scaffolding was intended to fix the standard of danger to the workmen. That would be all very well if the compensation was confined to accidents arising out of or in some way connected with the height of the building or the scaffolding. But that is not so. By sec. 7 the Act is made applicable to any employment "in or about any building," etc., without any qualification. A carpenter, for example, employed on the ground-floor in preparing and putting in the woodwork, the joists, doors, and window-frames, would be within the Act, though he never went near the scaffold. I have had the opportunity of seeing the judgment about to be delivered by Lord Brampton. He has gone very fully into the question whether the platform in question was scaffolding within the meaning of the Act. I will only say that I entirely agree with his reasoning. I express my concurrence in the motion proposed by Lord Macnaghten.

Lord Brampton: My Lords. Benjamin Hoddinott, the late husband of the appellant, a riveter, being a workman in the employ of the respondents, ironwork contractors, was, on August 19, 1898, fatally injured whilst working for them at and in a building at Putney exceeding 30 feet in height, and occupied as stables by the General Omnibus Company. He died on the 22nd of the month, leaving the appellant surviving him, and it is not disputed that if any compensation is payable under the Workmen's Compensation Act, 1897, in respect of his death, she is the person to claim it. The facts of the case are very loosely

stated, but are sufficiently supplemented in the judgment of Smith, L.J., to enable me to form my opinion upon them. The building, a new one, especially designed for stables, was erected for the General Omnibus Company, according to a contract and specification, by a firm of builders unconnected with the respondents, by means of ordinary builders' external scaffolding. It was roofed in and completed by the builders, so far as they were concerned, about six months before the time of the accident. On the completion of the building the scaffolding was removed, and from that time the stables have been occupied by the horses of the omnibus company. A few months after such completion, and very shortly before the accident, it was considered by the engineer of the company that the building was deficient in stability, and required to be stiffened in order to strengthen it and prevent its vibration by the wind, with possible danger to the whole structure. To remedy this it was determined to introduce iron stays (each weighing about one hundredweight), and by means of them to connect the iron girders over the stalls with the upright iron columns inside the building. The respondents were employed by the omnibus company, and they undertook to do this work, and the appellant's deceased husband was employed by them upon it. At the time of the accident he was with a fellow-workman inside the stable, standing upon a platform erected solely for the purpose of this work. It was used by the workmen in the daytime, but was removed every evening to enable the horses to occupy their stalls for the night. No poles were used in its construction; it was formed by boards, each 12 feet long, 9 inches wide, and 1½ inches thick, resting on ledgers lashed to the iron columns, and, in order to make the structure more firm, trestles were placed under the middle of the scaffold boards to support them. The platform on which the deceased was standing was raised about 8 feet above the ground. He was in the act of lifting one of the stays when he lost his balance and fell to the ground,

the stay falling on him, and he died from the injuries thereby occasioned. No question arises as to the regularity of the proceedings before the County Court Judge, who found as facts—first, that the building was of a height exceeding 30 feet, measured from the ridge of the roof, though the top of the parapet wall was only 28 feet; secondly, that the work the deceased was employed upon was a work of "construction, alteration, or repair," and he held that the structure from which the deceased fell was "scaffolding" within the meaning of sec. 7 of the Act, and awarded the appellant, as widow of the deceased, £245 14*s*. as compensation. I would here point out that there really was no finding to justify any award, for the County Court Judge only found that the deceased was engaged on one of three descriptions of work—construction, alteration, or repair. If it was "alteration," no claim would arise. The point, however, was not taken, and this House, I assume, will treat the finding as though the word "alteration" had been omitted. Sec. 7 of the Act, sub-sec. 1, enacts: "This Act shall apply only to employment by the undertakers on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." In endeavouring to arrive at a satisfactory interpretation of this section, one labours under considerable difficulty. The whole Statute is full of incongruities. In it so many things are said which could not have been meant, and so many things which must have been meant are left unsaid, that one often has great hesitation in forming a conjecture as to what may have been the views and intentions of its framers. What, for instance, could be the object of debarring a workman from seeking compensation under the Act for any injury he might sustain during his employment in erecting a building, intended to be of much greater height than that mentioned, by means of a scaffold, until that building has been already actually erected to a height exceeding 30 feet, even though such injury is caused by

something falling on him from the very scaffold which had been put up to a much greater height for the purposes of the building then in course of construction? Yet such was in substance ruled in the case of *Billings* v. *Holloway* ([1899] 1 W. C. C. 59), by compulsion of the plain unambiguous language of the Act. The effect of this enactment would, in the case of buildings intended to be 31 feet high, be to limit the liability of the employers to the period of time occupied in erecting the last foot. I have neither heard nor read any satisfactory reason for the enactment. I am rather inclined to think it was taken and adopted without consideration from art. 2 of the schedule to the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), defining the character of the accidents required to be notified to the Board of Trade—an article which is foreign to the objects of the Act which I am now considering, and was repealed by 58 & 59 Vict. c. 37, s. 54, before the passing of the Workmen's Compensation Act. It is not disputed by any one that the Act applies to internal as well as to external scaffolding. I pass on to consider now the only questions which this House is called upon to decide in the present case. They are, first, whether the work upon which the deceased was employed when he met with his injury was a work either of construction or repair; secondly, whether the structure from which he fell was "a scaffolding" within the meaning of sec. 7, sub-sec. 1. In his judgment in the Court of Appeal, Smith, L.J., said that it could not be construction, for that the building had already been constructed and completed, and was in actual use, and that which was done was only an addition to that which had originally been contemplated; and that an addition could not come under the head of repairs; and on that ground the appeal from the County Court Judge was allowed. I cannot assent to this view of the case, my own opinion being that that which was being done to the building was a work of construction. It must be conceded that, so far as the original builder was concerned, his contract

had been carried out according to the specification, and the external scaffolding had been removed six months before the accident, and it was then considered by all concerned that the building needed nothing more to make it fit for permanent use. This concession, however, seems to me to be immaterial. We have nothing to do with the building contract. The question we have to deal with is, Was the building in fact fully constructed, or was it faulty and deficient in its construction, for the purpose for which it was intended? If that which was being done when the accident occurred was needed for the proper strength of the building, and ought to have been done, but was omitted when the builder had finished his work, then, whether such omission was attributable to the neglect or oversight of those who framed the specification, or to the builder failing to perform his obligations, the building was in fact deficiently constructed, and if the work done was simply to supply that deficiency and make the building what it ought to have been at the first, it was a work of construction. It may be that it was also an addition in the sense that it was an addition of something necessary to supply an omission and give to this building that inherent strength which it ought to have had originally. If the same stays which were in course of being fitted when the accident happened had been so fitted before the original building had been handed over by the builders to the company, they would clearly have formed a part of the building: why should they not become so when fitted to supply the omission of that which was deemed to be essential to its security? I fail to see any reason, and I therefore think that the work was one of construction. Suppose the foundation of one of the walls had been found to be insecure, would not work done to make it safe be work of construction? Assuming that I am right in the view which I have expressed, what signifies it that the discovery of the defect was not made for a long time? That would not alter the fact. Assuming, however, for a moment that

when the builders' work was originally completed, it was in all respects apparently perfect, but that in the course of a few months it was from some undiscovered cause found to be deteriorated, and so unsteady that it was necessary to put in the stays or to do some other work to restore it to the condition it had been in when the builders left it—why that might not be treated as repair I fail to see. No cases have yet been decided upon the subject of what is "construction" and what is "repair." In *Wood* v. *Walsh* ([1899] 1 W. C. C. 68), Smith, L.J., said: "'Constructed or repaired' means some work relating to the structure of the buildings." I will now deal with the question whether the arrangement on which the deceased was working, and from which he fell, was a scaffolding within the meaning of sec. 7, sub-sec. 1 of the Statute. Hitherto the Court of Appeal seems to have treated this question as a matter of fact for the County Court Judge or the arbitrator, by whom the claim for compensation is heard, to determine, and to have held that his finding upon it is not open to review. In the last reported case on this subject, *Ferguson* v. *Green* (*post*, p. 113) it was so expressly ruled by Smith, M.R., and Collins and Stirling, L.JJ., following previous decisions by the same Court—*Wood* v. *Walsh* and *Maude* v. *Brook*. With all respect for those judgments, I cannot concur in them. I thoroughly agree that the arbitrator or County Court Judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before us is or is not "scaffolding" within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, etc.; and his finding upon such facts is, according to the general rule, final; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of sec. 7, is, in my

opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal. I think it expedient that it should be so, for were it otherwise, considering the number of County Court Judges and arbitrators who are called upon to try such cases, there would probably be much diversity in their judgments upon the question, and the law would be unsettled. Whereas by holding that the Court of Appeal has jurisdiction to review such finding, something like uniformity in the decisions as to what constitutes a scaffolding will very soon be established. This view is confirmed by the opinion of Collins, L.J., in the case of *Maude* v. *Brook*, in which he expressly said: "Whether a particular arrangement is a scaffolding is not a question of pure fact, and therefore not merely a question for a jury without direction as to the law." Whether a bicycle was a carriage within the meaning of the Highway Act was treated as a question of law in *Taylor* v. *Goodwin* (40 L. T. R. 458; 4 Q. B. D. 228). No definition is given in the Act as to what shall be deemed a scaffolding within the meaning of the 7th section. Nor do I think it possible to frame a satisfactory definition which would be universally applicable. Few people are unacquainted with that character of scaffold which has, for certainly many generations, been commonly used by builders, but nobody in these days would venture to assert that the meaning of the word "scaffolding" is confined to such arrangements as those; and I entirely agree with Rigby, L.J., who, in his judgment in *Maude* v. *Brook*, says: "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything, whether usual or unusual, that can properly be called scaffolding is within the Act;" and a little later on he illustrates his meaning by expressing a clear opinion that, if a builder had the control of two walls, one on each side of the site where a scaffold was needed, he might, if he could do so, utilize

them by laying planks across from one to the other, and that such a structure would be a scaffolding without the use of either poles or trestles; so in like manner in the present case, in my opinion, the iron columns already existing in the stables might equally be used—as they were—to form a scaffolding by lashing to them by ropes pieces of wood or metal to help in the support of the boards which were to form the platform on which the workmen were to do their work. No doubt, for all external scaffolding, wooden poles, boards, and planks, fastened together by ropes in the ordinary way, are commonly used, because they are found to be most convenient; but they are not essential to the formation of external scaffolding, while for internal scaffolding it would for the most part be impossible to use such scaffolding in houses or buildings divided into rooms. Possibly some day a question may arise whether an arrangement suspended from the ceiling, such as is often used for the interior of cathedrals, etc., is a scaffold within the Act. Old dictionary definitions, written more than a century ago, on such a subject are but of little use in these modern days, except to inform us as to the general character and use of a scaffold or scaffolding. For that purpose only I refer to an old dictionary published in 1754, in which a scaffold is described as "a place erected above the ground with poles for walls and supports, and boards laid loosely for floors, to serve a present occasion of workmen's standing safe and easily to repair or build a house, church, etc., or for spectators to see a show, etc.," and "scaffolding" is defined as "the poles, boards, etc., that are kept or made use of to build or erect scaffolds upon any occasion." In Walker's Dictionary "scaffolding" is defined as "a support for workmen." Now, when sec. 7 speaks of "a building which is either being constructed or repaired by means of scaffolding," it obviously includes either external or internal work of construction or repair, and it contemplates a scaffolding being used for either, and it is noticeable that it speaks of workmen employed "on, in, or

about" a building. The line between that which constitutes construction and that which constitutes repair is often a very fine one, and either may be needed either inside or outside a building. Brickwork may become defective, window or door sills may require to be taken down and replaced by new ones, beams supporting ceilings may give way, plastering may fall away from walls, etc., in any part of a building—for most of such works, whether of construction or repair, a scaffold of some kind is necessary. Outside the house, if the work to be done was high up, it might be most convenient to use a tall substantial one; inside, in rooms, a much smaller one would be all that was required, and that might be constructed in a variety of ways, and of any material or combination of materials suitable for the purposes. The size, height, and mechanism of it would, as a matter of fact, of course depend upon the position in the building of the place needing construction, reconstruction, or repair, and a variety of circumstances impossible to anticipate, which, therefore, I will not attempt to describe. A reference to decided cases will give some idea of what might and what could not satisfy the term "scaffolding." I will merely mention the most recent of them—*Wood* v. *Walsh*, *Maude* v. *Brook*, and the present case. In my opinion, the structure in the case now before us may well be described as a scaffold within the meaning of sec. 7. I know that Collins, L.J., expressed a different opinion both in this case and in *Maude* v. *Brook*. In the latter case that learned Judge summarizes his opinion thus: "The word 'scaffolding' as used in this Act indicates that there must be one system of scaffolding for the whole building which is capable of being used for its construction or repair as a whole." I cannot agree in this, for, were it so, it would be impossible to introduce into an ordinary room undergoing repair and requiring the use of a scaffold one adapted for the construction or repair of the whole building. I think that the meaning of the Legislature was that from time to time, when work of construction or repair required

the aid of a scaffold, any scaffold suitable for that particular purpose would be within the meaning of sec. 7. The scaffold used in the construction of the building as a whole had no connection with the accident in this case; it had ceased to exist months before the work on which the deceased was employed was even contemplated, and even had it been in existence, it would have been useless as regarded that work. Had there been no scaffold used in the construction of the original building I should have thought it immaterial to the present case, though it might have protected the employer against liability for compensation for accidents happening during the construction of the original building. The scaffolding pointed to in sec. 7 must and could only reasonably apply to one used for the particular work in the course of being carried out when the accident occurred. In construing this section it must be remembered that the Act was only passed in 1897, when an indefinite number of buildings exceeding 30 feet in height were in existence—some unsafe and requiring demolition, others badly constructed at first and requiring work of reconstruction; others from one cause or another falling into a state of deterioration and needing repairs to make them fit for future occupation. All these conditions must have been in the contemplation of the Legislature in framing the Act. When I realize to myself that the necessity for such works of construction and repair may occur in all or any parts of the building, whether high up near the top or low down even to the foundations, and that such defects will in course of time inevitably make their appearance in the now newest buildings, and that such works, reconstruction, or repair will, when the defects cannot be reached by a man standing on the ground, require the assistance of a scaffold, I feel driven to the conclusion that the Act, with all its faults, in using the word "scaffolding," meant scaffolding suitable for the occasion, and could not have intended to confine it to such a scaffold as was capable of being used for the construction or repair of the building as a whole,

which in a large majority of cases would be so inconvenient and costly as to be absurd. For the reasons which I have given, I think that this appeal should be allowed with the usual costs.

LORD LINDLEY: My Lords. This is an appeal from a decision of the Court of Appeal against an award made under the provisions of the Workmen's Compensation Act, 1897. The facts of the case are not in all respects so clear as might be desired; but admissions were made by counsel on both sides, both before the Court of Appeal and at your Lordships' Bar, and with the assistance of those admissions the facts may be stated as follows:—Some time before the accident which gave rise to the claim for compensation, the London General Omnibus Company had employed some builders to erect some large stables for them in Putney. Those stables had been erected and completed, according to the original design and specification, some five or six months before the time of the accident, and had been taken over and used by the omnibus company for stabling their horses. The stables were constructed partly of iron. The ironwork consisted of upright pillars carrying transverse girders. There were two stories, and the horses were stabled both on the ground floor and on the first floor. The height of this erection was 28 feet from the ground to the top of the walls, and 36 feet to the ridge of the roof. None of the scaffolding used in the erection of the stables was standing when the accident happened. The respondents, Newton, Chambers, & Co., had not been employed in the erection of these stables. After they had thus been completed and had been in use for stables, it was thought desirable to put in some iron stays in order to prevent vibration, and the respondents, Newton, Chambers, & Co., were employed by the omnibus company to do this work. The stays were T angle-iron bars 12 feet or 14 feet long, and about one hundredweight in weight. These were to be fastened by one end to the upright pillars on the ground floor, and to the transverse girders carrying

the first floor. The stays were put diagonally across the angles made by the pillars and girders, and they met, or nearly met, at the top. They thus stiffened the ironwork and stopped the vibration. The extent of the vibration is not proved; the cause of it is not proved; why it was desirable to stop it is not proved. There is no evidence whatever to show that the building was unsafe. It was stated before the coroner that the stays were put in "to stay the building so that the wind might not vibrate it." The evidence before the coroner was used by consent before the Judge of the County Court, and also before the Court of Appeal. But this is all that can now be ascertained as to the reason for putting in the stays. The inquiry is only important with reference to the question whether the building was being constructed when the accident happened. To this question I will return presently. The stays were put up in the daytime, when there were few, if any, horses in the stables. The stays had to be lifted up into their proper places, and held there for a short time whilst the places at which rivet-holes were to be made were marked. To enable the workmen to raise the stays to their places and to hold them there, platforms had to be constructed about 8 feet above the ground floor; and in order to stable the horses at night these platforms had to be daily constructed when the stables were empty, and to be removed before the horses came in for the night. These platforms were made by placing ordinary loose planks carried by trestles and by ledgers laid across poles lashed to the pillars. These platforms are called scaffolds by all the witnesses who speak of them, and by the County Court Judge and by the members of the Court of Appeal. I so regard them; I do not know how better to describe them. I will consider presently whether they come within the meaning of a scaffolding as used in the Workmen's Compensation Act. The husband of the appellant was on one end of these scaffolds, lifting one end of a stay, whilst another man was lifting the other end. The appellant's husband

overbalanced himself, or was overbalanced, and he fell from the scaffold, and died shortly afterwards. The appellant brought an action for damages against the respondents on the ground of negligence and defect in the scaffold; but the County Court Judge decided that the scaffold was not insufficient, and that the accident was not caused by insufficient scaffolding. Thereupon an application was made for compensation under sec. 1, clause 4, of the Workmen's Compensation Act, 1897, and the County Court Judge heard such application, and decided that the respondents were "undertaking the construction, alteration, or repair of the stables." He further decided that the building exceeded 30 feet in height, and he awarded the appellant compensation to the amount of £245 14*s.*, from which, however, the respondents' costs of the action were to be deducted. From this award the respondents appealed, and the Court of Appeal set aside the decision of the County Court Judge. From this decision the appellant has obtained leave to appeal *in formâ pauperis* to this House, and the appeal has been fully argued at your Lordships' Bar. The case turns on secs. 1 and 7, clauses 1 and 2, of the Workmen's Compensation Act, 1897, and on the language there used with reference to buildings. The putting in of the stays was not an "engineering work" as defined in sec. 7. This observation is important, because in the case of an engineering work undertakers are defined to mean "the persons undertaking the construction, alteration, or repair;" while in the case of a building undertakers are defined to mean "the persons undertaking the construction, repair, or demolition," the word "alteration" being omitted. Confining ourselves to buildings, and interpolating the definition of undertakers of buildings, sec. 7, clause 1, makes the Act applicable only to employment by persons undertaking the construction, repair, or demolition of any building of any person on, in, or about any building which exceeds 30 feet in height, and is being constructed or repaired by means of a scaffolding or being demolished.

Now, I cannot bring myself to say that the respondents were persons undertaking the construction, repair, or demolition of these stables. Demolition may be disregarded; nothing was being demolished. Repair may also be disregarded; nothing was out of repair. Construction alone remains; but can it be fairly said that the respondents, who had nothing whatever to do with the erection of the stables, undertook the construction of them when they undertook to stop or diminish the vibration of which their owners complained? It is true that the stays were additions to portions of the structure of the stables, and in that way were additions to the stables. But constructing a building is one thing; improving it after it is constructed, even by making additions to its structure, is quite a different thing. I quite admit that it may be very difficult to draw the line sharply in all cases between constructing a building and adding to its structure; but in this particular case I see no difficulty at all in coming to the conclusion that the respondents in this case did not undertake to construct this building, and were not undertakers within the meaning of the Act. I cannot bring them within the words of the definition. The fact that the word "alteration," which enters into the definition of undertakers of engineering works, is omitted from the definition of undertakers of buildings, is not to be overlooked, and it supports the conclusion at which I have arrived. If the omission were designed, it would support such conclusion very strongly. But the Act is very badly drawn, and it is scarcely safe to rely on the contrast between the two definitions. It is safer to rely on the fact that in the definition of undertakers of buildings nothing is said about additions, improvements, or alterations; and, unless they can fairly be regarded as works of construction, repair, or demolition, the persons who undertake them are not undertakers as defined in sec. 7. The learned County Court Judge evidently failed to appreciate the difficulty created by the definition clause; for he introduced the word "alteration," and found that

the respondents were undertaking the "construction, alteration, or repair." This finding was clearly insufficient to make them liable under the Act. I pass now from the builders to the building itself. The Act does not apply to all buildings, but only to those which exceed 30 feet in height and are being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof. These words relating to the use of machinery have no application to the present case, and I therefore say nothing about them. The provisions relating to height and to the use of scaffolding refer to the time of the accident, and not to any time before or afterwards. The use of the present tense "which exceeds 30 feet," and "is either being constructed or repaired," etc., shows this; and the Court of Appeal so decided in *Billings* v. *Holloway* ([1899] 1 W. C. C. 59). Why 30 feet should have been adopted as the minimum height is not apparent, but that limit is adopted, and the only question is how the measurement is to be made. The County Court Judge and the Court of Appeal have both held that the height of the roof must be reckoned, and be added to the height of the walls, and this appears to me obviously correct. The reference to scaffolding creates great difficulty. Secs. 1 and 7 of the Act clearly extend to accidents which are not caused by defective scaffolding, and are not in any way attributable to the use of scaffolding. If a house is 30 feet high, and is being constructed or repaired by means of a scaffolding, and any workman is injured to the extent mentioned in sec. 1, clause 2*a*, by any accident arising out of and in the course of his employment on, in, or about such building, he is entitled to compensation, whatever the cause of such accident may have been, unless it arose from his own serious and wilful misconduct: (see sec. 1, clause 2*c*). This seems plain from the language of secs. 1 and 7, and has also been decided by the Court of Appeal in *Maude* v.

*Brook* (*ubi sup.*). But the use of a scaffolding is essential to bring a building being constructed or repaired within the Act where no machinery is employed to construct or repair it. What is meant by a scaffolding? Is any scaffolding meant? Is there any difference, material to the present question, between a scaffolding and a scaffold? There is nothing in the Act which requires the scaffolding to be of any particular description or dimensions, or to be in any particular place or of any particular height. I cannot help thinking that to make any distinction between one scaffolding and another, or between a scaffolding and a scaffold, would be to introduce a subtlety not required by the Act, and one far too fine for practical work. In my opinion, anything which can fairly be called a scaffold is a scaffolding within the meaning of sec. 7 if used as mentioned in the Act. This I understand to be the view adopted by Smith and Rigby, L.JJ., in this case and in *Maude* v. *Brook*. But a more restricted meaning is put on the word "scaffolding" by Collins, L.J. He thinks that boards on trestles inside a room are not in point of law a scaffolding within the meaning of the Act, and he did not consider the platforms in this case to be such a scaffolding. He thinks that nothing can be a scaffolding within the Act except "one system of scaffolding for the whole building, which is capable of being used for its construction or repair as a whole." I cannot go so far. I cannot say that boards on trestles even inside a room may not be a scaffolding, and still less can I say that the platforms in question in this case could not be so regarded if used as mentioned in the Act. This question of scaffolding is one of such importance, and it was so much discussed at your Lordships' Bar, that I have thought it desirable to refer to it, and to express my own opinion upon it. But, although I think that the platform in this case might have been a scaffolding within the meaning of sec. 7, and that the stables were a building more than 30 feet high, yet for reasons already stated I cannot come to the conclusion that such building was

being constructed or repaired when the accident happened. The Act, therefore, has no application to this case; it does not apply either to the respondents or to the building at the time of the accident. The appeal ought, in my judgment, to be dismissed.

Judgment appealed from reversed, with costs; judgment of the County Court Judge restored.

Solicitor for the appellant, *C. F. Appleton.*

Solicitors for the respondents, *Ingle, Holmes, & Sons.*

Also reported (1901) A. C. 49; 70 L. J. Q. B. 150; 84 L. T. R. 1; 4 W. R. 380; 17 T. L. R. 134.

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March 14, 1901.

## DREDGE *v.* CONWAY.

Before A. L. Smith, M.R., Collins and Romer, L.JJ.

84 *L. T. R.* 345.

*Construction or Repair—Whitewashing.*—Sec. 7, 1.

Whitewashing a ceiling of a house is repair.
*Wood* v. *Walsh* ([1899], 1 W. C. C. 68) is no longer law.

This was an appeal by the applicants from the award of the County Court Judge at Gloucester in proceedings for compensation under the Workmen's Compensation Act, 1897.

The applicants were the widow and the eldest son of a workman who was killed by an accident arising out of and in the course of his employment by the respondents.

The deceased workman was a foreman in the employment of the respondents.

The respondents had undertaken to do certain work at the St. Mark's Schools, Gloucester, which was a building which exceeded 30 feet in height.

This work was being done under an estimate, which comprised the following work: Scraping and whitening or distempering ceilings; brushing down and distempering or redistempering walls; cleaning and touching up with paint certain woodwork and portions of walls; painting certain chimney-pieces, window-sashes, and balusters; cleaning roof timbers; repairing kerbs and hearths of fireplaces; rehanging a door; providing and fixing knobs to a desk; and replacing or providing and refixing hat hooks.

There was ordered subsequently certain additional work which, besides work of a similar description to that contained in the estimate, included repairs to spouting and roof and the reglazing of broken window-panes.

The deceased workman was employed upon this work.

On July 28, 1900, he was engaged in whitewashing a ceiling, and for the purpose of doing this work he was standing upon an arrangement of ladders and planks.

While he was so working the arrangement collapsed, and he fell to the ground and was killed.

The work of whitewashing included the work of preparing the walls and ceilings by cutting out and stopping or filling any cracks or holes in the walls or ceilings in the usual way in which such work is done.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides:

Sec. 1.—(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act.

Sec. 7.—(1) This Act shall apply only to employment by the undertakers, as hereinafter defined . . . on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished. . . .

The County Court Judge found that the arrangement in question was a "scaffolding" within the meaning of the

Act. He further found that, apart from the whitewashing and distempering, none of the other works comprised in the estimate and additional work were in progress at the time of the accident, and that no scaffolding was being used for their execution; and that the scaffolding was being used only for the purpose of whitewashing and distempering walls and ceilings, and for the preparation of the walls and ceilings in the ordinary way for that purpose.

The County Court Judge held, upon the authority of *Wood* v. *Walsh* ([1899] 1 W. C. C. 68), that the building was not "being repaired" within the meaning of sec. 7 (1) of the Act, and made his award in favour of the respondents.

The applicants having appealed, the hearing of the appeal was adjourned until after the decision of the appeal to the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*ante*, p. 74).

*Ruegg*, K.C., and *Morton Brown* for the appellants: When this case was decided by the County Court Judge he considered himself bound, by the decision of this Court in *Wood* v. *Walsh* (*ubi sup.*), to hold that whitewashing was not repair within the meaning of sec. 7 of the Workmen's Compensation Act, 1897, and that therefore the workman was not employed upon a building which was "being repaired" within the meaning of sec. 7. The decision in *Wood* v. *Walsh* (*ubi sup.*) has, however, since been overruled by the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* In the latter case the construction which this Court had put upon the words "being repaired" was not approved. Lord Macnaghten said: "Now, repair, as the word is commonly understood, is repair whether much is done or little. Repair for the most part is occasional and partial. . . . Construction, repair, demolition—these three operations cover, I think, every varying phase in the life of a building from its beginning to its end." Lord Morris said: "In my opinion, when you

realize what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing." Therefore, all operations upon a building, if not construction or demolition, must be repair, and repair cannot be limited to work of a structural kind done upon the structure, as was held in *Wood* v. *Walsh* (*ubi sup.*). Further, this building was being "repaired" even in the more limited sense. The whole work was being done upon this building under one contract, and that contract included matters which were undoubtedly work of repair, and it is immaterial whether the workman who is injured is engaged upon work of repair or not if the building is in fact being repaired.

*A. Powell*, for the respondents: The work upon which the deceased workman was employed was not within the Act, for the building was not being "repaired." It was decided by this Court, in *Wood* v. *Walsh* (*ubi sup.*), that ordinary painting was not repairing, and that decision must also apply to ordinary whitewashing. The decision in *Wood* v. *Walsh*, so far as this question is concerned, has not been affected by the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* In that case it was not decided that everything done to a building was either construction, repair, or demolition; the decision was only that the work there in question was work of construction. There is nothing in that case which goes so far as to say that such work as painting and whitewashing is repair. If the observations of Lords Macnaghten and Morris in that case are to be taken in their widest meaning, apart from the facts of that case, they would include as construction and repair many things, such as fresco painting and other purely decorative work, which could not possibly be called construction or repair. Whitewashing is not necessary to preserve anything, and cannot be called repair, though painting may be necessary for preservation. With reference to the argument that the contract in this case provided for some things which were undoubtedly repairs,

it has been found as a fact that none of them had been commenced when the accident happened; and, further, those things would not be done by means of a scaffolding. The Act says "building which is being repaired"—*i.e.*, at the time when the workman is injured by accident.

*Ruegg*, K.C., was not called upon to reply.

SMITH, M.R.: This is an appeal by the widow of a workman from the award of the County Court Judge in proceedings under the Workmen's Compensation Act, 1897, the learned Judge having made his award in favour of the masters. I think that, before the decision of *Hoddinott* v. *Newton, Chambers, & Co.* (*ante*, p. 74) in the House of Lords, the decision of the County Court Judge was right. In *Hoddinott* v. *Newton, Chambers, & Co.* (*ubi sup.*), however, the House of Lords placed a construction upon sec. 7 of the Act which this Court had not adopted. The circumstances under which this case arises are as follows. The respondents had entered into a contract to do certain work upon the premises upon which the accident happened. Some items of the work were: scraping and whitening or distempering ceilings; cleaning and touching up with paint certain woodwork and portions of walls; painting certain chimney-pieces, window-sashes, and balusters; cleaning roof timbers; repairing kerbs and hearths of fireplaces; repairs to spouting and roof; and the reglazing of broken window-panes. That was the contract which was being carried out by the respondents. The first question is whether that was a contract to do repairs to the building. The building was over 30 feet high, and the work of whitewashing, upon which the workman was engaged, was being done by means of a scaffolding. The scaffolding was not required for the work of putting in new grates. The workman was killed by accident while engaged upon this work of whitewashing. The question is, whether he was engaged upon work which comes within sec. 7 of the Workmen's Compensation Act, 1897. The County Court Judge has found as a fact that the work of putting in the

new grates had not been commenced at the time when the accident happened, though it all formed part of one contract. If this case had come before us before the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*ubi sup.*), I should have said that white-washing and painting were not repairing within the meaning of sec. 7 of the Act, as we held in *Wood* v. *Walsh* (*ubi sup.*), where I said that the words "constructed or repaired" meant "some work relating to the structure of the building." In *Hoddinott* v. *Newton, Chambers, & Co.* (*ubi sup.*) the question arose with respect to stables which were new buildings and had been perfectly constructed; no repairs were needed, but it was thought that the building required stiffening, owing to some vibration, and some iron stays were placed between the girders and pillars which supported the building. A workman was killed who was engaged on that work, and the question arose in this Court whether the building was being "constructed or repaired" within the meaning of sec. 7 of the Act. We held in this Court that those words had been inserted in the Act in order to limit the operations upon a building which would come within the Act, and we held that the building in question was being neither constructed nor repaired. In the House of Lords it was held, by a majority, that our construction of the Act was wrong. The first judgment was delivered by Lord Macnaghten, and he said: "The question, as it seems to me, is this: Was the work—the thing that was actually being done—a work of construction or a work of repair, or something which was neither the one nor the other, neither construction nor repair? It seems a strong thing to say that when a building is once completed according to the original design you cannot have anything further in the way of construction unless the work be of such a character as to make the building practically a new building. That, however, was the argument. But the Act, it will be observed, uses the word 'construction,' not the word 'erection.' It speaks of a building 'being constructed,'

not of a building 'being erected.' And it couples 'construction' with 'repair.' Now, repair, as the word is commonly understood, is repair whether much is done or little. Repair, for the most part, is occasional and partial." Lord Macnaghten, therefore, does not adopt the rule which we laid down in this Court that repair means something structural. Then the learned Lord goes on to say that which is very important upon the question which we are now considering: "Construction, repair, demolition—these three operations cover, I think, every varying phase in the life of a building from its beginning to its end." It seems to me that the fair meaning of that judgment is that the learned Lord does not adopt the limited meaning which we in this Court placed upon the word "repaired" in the Act as meaning only something structural. This case, in my opinion, comes within that definition given by Lord Macnaghten, and we cannot now say that painting or whitewashing is not repair, for what this Court said in *Wood* v. *Walsh* (*ubi sup.*) is no longer the law. Then Lord Davey agreed with all that had been said by Lord Macnaghten, and Lord Morris said: "Nothing, in my opinion, remains but the question, Was the operation being performed on the building at the time of the accident either constructing or repairing the building? In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing, or repairing, or demolishing—alteration in its construction is, in my opinion, construction." Therefore, Lord Morris also must have thought that *Wood* v. *Walsh* (*ubi sup.*) was wrongly decided in this Court. It is therefore, in my opinion, now clear that painting is work within the Act, and that therefore whitewashing must be work within the Act. The accident in this case therefore happened while the workman was engaged upon work within the Act. I do not, however, decide in this case that work of mere ornamentation is within the Act; that question may arise for decision on some future occasion. For these reasons I think that

the award of the County Court Judge was wrong, and that this appeal must be allowed.

COLLINS, L.J.: I am of the same opinion. I think that, since the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*ubi sup.*), it is impossible to say that the building in this case was not being either constructed or repaired by means of a scaffolding within the meaning of the Act. The building was more than 30 feet in height, and therefore all the conditions required by the Act were fulfilled. The broad principle laid down by Lord Macnaghten is the governing principle upon which the House of Lords decided the case of *Hoddinott* v. *Newton, Chambers, & Co.* (*ubi sup.*). Lord Macnaghten, after the last passage which has been read by the Master of the Rolls, went on to say: "I prefer to rest my judgment on this broad ground." Lord Morris said: "All operations on it must be either constructing, repairing, or demolishing. . . . If work of the nature of construction goes on—that is, constructing—and if the work of the nature of repair—that is, repairing—and there is no room for any third operation of so-called alteration, as distinct from constructing or repairing;" and Lord Davey, after hearing that broad principle laid down by Lord Macnaghten, says that he agrees with him, and he also, therefore, concurs in that broad principle. One of the essential steps by which Lord Macnaghten arrived at that broad principle was by eliminating all those broad considerations, which we took into consideration in this Court when we decided the case of *Wood* v. *Walsh* (*ubi sup.*), as to the general scope and intent of the Act, and the class of work which it embraced, from the general provisions of the Act as to buildings. Looking at the judgments in the House of Lords, it appears that all those considerations were eliminated in considering what was the meaning of the words "being constructed, or repaired, or demolished." Lord Macnaghten said so, for he said: "The provision as to the height of the building, and the provision with reference to a scaffolding, serve

roughly to draw a line of demarcation between employments with which the Act is not concerned and those to which it is intended to apply. They were intended to exempt a certain class of buildings, and perhaps a certain class of builders of the humbler sort, from the operation of the Act. They are obviously copied from the Factory and Workshop Act, 1895, where the same provisions serve a somewhat similar purpose. I do not think they throw any light on the construction of the Act." We must, therefore, now approach these questions without drawing any inference from the context or from the general conditions imposed by the Act, and we must now hold that painting and whitewashing are such operations upon a building as, in accordance with the principles laid down by the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.* (*ubi sup.*), ought to be called repairs. Therefore the workman who was killed by accident in this case was employed on a building which was being "repaired" within the meaning of sec. 7 of the Act. The appeal must, therefore, be allowed.

ROMER, L.J: I agree. In my opinion, upon the facts of this case, the building in question was "being repaired by means of a scaffolding," within the meaning of sec. 7 of the Workmen's Compensation Act, 1897. Work was being done upon the building of a substantial character, and which was necessary for the due preservation of the building. I wish, however, to guard myself from being supposed to hold that every small and unimportant piece of work of papering, or painting, or whitewashing is within the Act merely because trestles or some other artificial supports are being used in doing the work.

Appeal allowed.

Solicitor for the appellants, *C. T. Courtney-Lewis*, for *W. Langley-Smith*, Gloucester.

Solicitors for the respondents, *William Hurd & Son.*

Also reported (1901) 2 K. B. 42; 70 L. J. K. B. 494; 84 L. T. R. 345; 49 W. R. 518; 17 T. L. R. 355.

Though the law laid down in *Wood* v. *Walsh* has been overruled, it must be noted that the Court of Appeal agreed with the finding of the arbitrator that the ladder propped against the outside of the house was not scaffolding. See *Ferguson* v. *Green* (*infra*).

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November 14, 1900.

## FERGUSON *v.* GREEN.

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 461.

*Scaffolding.*—SEC. 7, 1.

A structure of trestles with boards laid across them for the purpose of enabling a plasterer to reach the ceiling may, or may not, be "scaffolding." Whether it in fact is or is not depends upon the mind of the arbitrator.

Whether a certain arrangement is or is not "scaffolding" is a question of fact.*

THIS was an appeal by the respondent in the County Court from the decision of the County Court Judge of Oldham in proceedings for compensation under the Workmen's Compensation Act, 1897.

The applicant was a working plasterer employed by the appellant, who was a master plasterer.

The appellant had entered into a contract directly with the building owner to do the plasterers' work in connection with certain cottages.

Prior to October 18, 1899, these cottages, which had been constructed by means of a substantial scaffolding on the outside, had been roofed in and the scaffolding had been removed.

The applicant was engaged upon plastering work on the walls and ceilings in the different rooms of the cottages.

In order to reach the ceilings and higher parts of the

* See footnote to this case.

walls the applicant had constructed a platform by means of two trestles about 4 feet 6 inches high, across which he placed loose boards, and upon the platform thus formed he stood whilst doing his work. On this platform he placed a small table upon which he manipulated the plaster used in his work.

On October 18 the applicant put up the trestles and planks in one of the rooms, and formed a platform as before and placed the table thereon.

He mounted the platform in order to do his work, and before he had actually commenced plastering he discovered that a board of the table was unsteady, and, whilst in the act of mending it with a hammer, a nail flew into his eye, causing injury which resulted in the eye having to be removed.

The building in question was more than 30 feet high.

The applicant claimed compensation under the Workmen's Compensation Act, 1897, and the County Court Judge referred the matter to an arbitrator.

The arbitrator, having heard the matter, made his award in the form of a special case for the consideration of the County Court Judge.

The arbitrator found the facts as above, and that the appellant was an "undertaker," and that the applicant was engaged in work of construction upon a building which was being constructed. He further found that the building was not being constructed by means of a "scaffolding" within the meaning of sec. 7 (1) of the Act, and in arriving at that conclusion he "not only considered the combination of trestles and planks, but considered the word 'scaffolding' in connection with the other words in the sub-section."

The arbitrator therefore held that the applicant's employment was not an employment within the Act, and dismissed his application.

The material question of law submitted to the County Court Judge was whether the arbitrator was "entitled to

construe the word 'scaffolding' by reference to the other words in the sub-section."

The County Court Judge remitted the case to the arbitrator for further statement upon the following points: (1) That the arbitrator, after construing the word "scaffolding" by reference to the other words in sec. 7 (1) of the Act, do set out the legal interpretation he puts on the said word, and especially whether he has adopted the meaning laid down by the majority of the Court of Appeal in *Maude* v. *Brook* ([1900] 2 W. C. C. 69); (2) that he state in what way he distinguishes this case from the case of *Maude* v. *Brook;* (3) that he set out as a question of law for the Judge the question whether he has given the correct legal meaning to the said word.

The arbitrator then stated a further case, as follows:

(1 and 3.) I cannot set out any legal interpretation of the word "scaffolding." The Court of Appeal declined to do so in the cases of *Wood* v. *Walsh* ([1899] 1 W. C. C. 68), *Hoddinott* v. *Newton, Chambers, & Co.* ([1899] 1 W. C. C. 62), and *Maude* v. *Brook* (*ubi sup.*). I cannot gather any meaning as laid down by the majority of the Court in *Maude* v. *Brook.* I understand that the question, scaffolding or no scaffolding, is, according to the majority of the Court of Appeal, one of fact only, and I therefore asked myself (as a jury) "whether this arrangement of trestles and planks could have been reasonably used as a scaffolding in the construction of a building at least 30 feet high at a time when the building was in fact 30 feet high." I came to the conclusion that, although possibly one or more of the planks might (as suggested by Rigby, L.J.), the arrangement could not, and I therefore found as a fact that the arrangement was not a scaffolding within the Act. I should have been bound to adopt the same process if the planks had rested on two bricks. I submit as a question for the decision of the Judge whether I was right in directing myself as above stated. (2) I cannot distinguish the facts of this case from *Maude* v. *Brook,* but I understand

that the Court merely refused to interfere with a finding of fact, and I conclude I am not bound by it in any way.

The County Court Judge held that the arbitrator was wrong in finding that the arrangement was not a "scaffolding," because, if he had taken the law as laid down in *Maude* v. *Brook* and applied it to the facts of the case, he would have come to the opposite conclusion. He accordingly reversed the decision of the arbitrator, and held that the applicant was entitled to compensation.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides:

Sec. 1. If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act.

Sec. 7. This Act shall apply only to employment by the undertakers, as hereinafter defined, on, or in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers, as hereinafter defined, on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof.

Second Schedule.—(4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the County Court Judge, and the decision of the Judge on any question of law, either on such submission or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal.

*Ruegg*, Q.C., for the appellant: The County Court Judge was wrong in overruling the decision of the arbitrator, because the arbitrator had decided this question as one of fact, and the appeal to the County Court Judge is upon questions of law only. It was decided in this Court that the question whether a particular arrangement is or is not a "scaffolding" is one of fact for the County Court Judge or arbitrator who hears the case to decide: *Maude* v.

*Brook* ([1900] 2 W. C. C. 69), *Wood* v. *Walsh* ([1899] 1 W. C. C. 68), *Hoddinott* v. *Newton, Chambers, & Co.* ([1899] 1 W. C. C. 62).

In *Maude* v. *Brook* the decision of this Court was only that there was evidence upon which the Judge might find as a fact that the arrangement was a "scaffolding," and the award of the Judge was accordingly upheld. There was no decision in this Court that the arrangement was a "scaffolding," and therefore, although the arrangement in the present case was practically the same as that in *Maude* v. *Brook*, there is nothing in that case to prevent the arbitrator coming to an opposite conclusion of fact in the present case. All the above cases say that the decision of the Judge or arbitrator upon this question of fact will not be interfered with in this Court if there is any evidence to support his finding.

*B. G. Wilkinson*, for the respondent: The decision of the County Court Judge in overruling the decision of the arbitrator was right upon two grounds. First, the facts of this case are practically identical with the facts in *Maude* v. *Brook* (*ubi sup.*), and therefore the arbitrator was wrong in not following the decision in that case. Secondly, the arbitrator misdirected himself as to the meaning of this section of the Act, and did not adopt the interpretation put upon it by the majority of this Court in *Maude* v. *Brook*.

*Ruegg*, Q.C., was not called upon to reply.

SMITH, M.R.: This is an appeal by the master, who has been held liable by the County Court Judge to pay compensation for injury to a workman under the Workmen's Compensation Act, 1897. The County Court Judge delegated the trial of the matter to an arbitrator. The arbitrator decided several points, to which I need not now refer, because there is no appeal with regard to them. The arbitrator found that the arrangement of trestles and planks in this case was not a "scaffolding" within the meaning of the Act, and made his award in favour of the master,

because the workman did not bring the case within the Act by showing that there was a scaffolding. First of all, was it a question of fact or a question of law whether this arrangement was a "scaffolding" or not? From the beginning of the cases under this Act we have always refused in this Court to give any definition of a scaffolding. The Legislature has left this question to the County Court Judge, or the arbitrator, as a question of fact, and the jurisdiction of this Court is to entertain appeals on questions of law only. We have held over and over again that, if there is any evidence to support the finding upon a question of fact, we will refuse to interfere with the decision of the County Court Judge or arbitrator. We have always said that it is a question of fact whether a particular arrangement is or is not a "scaffolding," and that we would not say in this Court what was and what was not a "scaffolding," because it was the duty of another tribunal to decide that as a question of fact. From the three cases which have been cited—*Maude* v. *Brook*, *Wood* v. *Walsh*, and *Hoddinott* v. *Newton, Chambers, & Co.*—it will be seen that this Court has consistently refused to meddle with findings of fact of the Court below upon this question as to whether a particular thing is a scaffolding or not. I agree that in the case of *Maude* v. *Brook* (*ubi sup.*) the facts were substantially identical with the facts in the present case. In that case the majority of the members of this Court, the County Court Judge having held that the arrangement in that case was a scaffolding, held that there was evidence upon which the County Court Judge could, if he liked, so find, and the Court refused to interfere with his decision. In that case my brother Collins, L.J., differed, and held that there was no evidence upon which the Judge could find that there was a scaffolding within the meaning of the Act. It seems to me that the County Court Judge in the present case approved of the judgment of Collins, L.J., and gave judgment in favour of the workman. How did he do that? The arbitrator appointed by the County Court

Judge found upon the facts that this arrangement of trestles and boards was not a scaffolding within the meaning of the Act. I do not understand the decision of the County Court Judge. The County Court Judge can review the decision of the arbitrator only upon a question of law, and not upon a finding of fact, when there is any evidence to support that finding, in the same way as this Court is limited in its review of the decisions of a County Court Judge. It is urged that this is a different finding upon the same facts. In *Maude* v. *Brook* (*ubi sup.*) this Court expressly held that it would not interfere with the decision of the County Court Judge. For these reasons I think that the award of the arbitrator in this case must stand. It is quite true that in *Maude* v. *Brook* (*ubi sup.*) another County Court Judge held that this same arrangement was a scaffolding, but this does not bind any other Judge or arbitrator. I think, therefore, that upon the finding of the arbitrator the appellant is entitled to succeed, and that this appeal must be allowed.

COLLINS, L.J.: I am of the same opinion. The County Court Judge has tried in his judgment to apply a good deal of the reasoning which I used in *Maude* v. *Brook* (*ubi sup.*). I think that the net result of the decisions is that an arrangement such as was used in the case of *Maude* v. *Brook* (*ubi sup.*), which was substantially identical with that in the present case, may come within the meaning of the word "scaffolding" in the Act, but that it is a question of fact whether it does or does not do so. I have always thought, and still think, that there is nothing in the decisions which decides that it is not a mixed question of law and fact whether the thing in question in a particular case is a scaffolding or not. What definition of "scaffolding" may be given admits of different opinions. But the law, as it is now established by the cases, is that an arrangement such as that used in the present case may be a "scaffolding," and that, if the County Court Judge or arbitrator directs himself as a matter of law that it cannot

be, then I think that his decision can be dealt with on appeal. In the present case the arbitrator has decided as a question of fact that this arrangement was not a "scaffolding." I confess that I find it difficult to see how he could have so found if he loyally accepted the decision in *Maude* v. *Brook* (*ubi sup.*) that such an arrangement may be a "scaffolding." He has, however, so found as a fact, and he says that he has not misdirected himself as to the meaning of "scaffolding," and we cannot deal with his decision as being against the weight of evidence. He was not bound to find, as a matter of law, that this was a "scaffolding." I think that the County Court Judge pressed the decision of this Court in *Maude* v. *Brook* (*ubi sup.*) too far in supposing that this Court decided that the arrangement in question was in fact a "scaffolding," and that he went too far in deciding that as a matter of law this arrangement was a "scaffolding.' I agree, therefore, that the decision of the arbitrator ought to stand, and that this appeal must be allowed.

STIRLING, L.J.: I have come to the same conclusion. We are bound by the decision in *Maude* v. *Brook* (*ubi sup.*). That case simply decides that as a matter of law such an arrangement as that in question may be a "scaffolding" within the meaning of the Workmen's Compensation Act, 1897; it does not decide as a matter of law that such an arrangement is necessarily a "scaffolding." The question whether the thing is a scaffolding is left in each case to be decided by the arbitrator or County Court Judge as a question of fact. In *Maude* v. *Brook* (*ubi sup.*) it was found as a fact that the arrangement was a "scaffolding," and the Court of Appeal held that there was evidence upon which the County Court Judge might so find, and refused to interfere with his decision. There is, therefore, no decision that as a matter of law an arrangement such as this is a "scaffolding," and this appeal must therefore be allowed.

Appeal allowed.

Solicitors for the appellant, *William Hurd & Son*, for *Payne, Galloway, & Payne*, Manchester.

Solicitor for the respondent: *E. A. W. Wragg*, Manchester.

The facts in this case are similar to those in *Maude* v. *Brook* ([1900] 2 W. C. C. 69). In that case Collins, L.J., in a dissentient judgment held (1) that "scaffolding" must have some relation to the height of the building, and (2) that whether an arrangement was "scaffolding" was not a pure question of fact. *Hoddinott* v. *Newton, Chambers, & Co.* (*ante*, p. 74) shows the former was incorrect, and that the latter was approved of by Lords Macnaghten and Brampton.

In *Ferguson* v. *Green*, Collins and Stirling, L.JJ., felt bound by the decision in *Maude* v. *Brook*.

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May 10, 1901.

## McGREGOR *v.* WRIGHT.

### Before His Honour Judge Shortt.

*The Law Times, June* 22, 1901.

*Scaffolding—Planks—Gangway—Building—Separate Erections—Factory—Steam Engine for Pumping Water—Engineering Work—Any other Work.*—Sec. 7, 1.—*Factory and Workshop Act*, 1895, *sec.* 23.

Three planks placed across the top of a pit and used as a gangway may be scaffolding.

A pit 6 feet deep, lined with cement, in which it is intended to place a condenser chamber, which is to be connected by pipes with a boiler-house 22 feet away, where there is a chimney 70 feet high, is part of a building over 30 feet in height.

A steam engine used for the purpose of pumping water out of the foundations of a new building, some of which water is used in mixing the cement and mortar used in the construction of the building, is a factory.

The expression "any other work" in the definition of "engineering work" is not limited to work *ejusdem generis* as work on a railroad, harbour, dock, canal, or sewer.

At Brigg County Court, on May 10, his Honour Judge Shortt gave his decision in this case.

The applicant claimed 20*s*. per week during the time he was incapacitated through an accident whilst in the employ of the respondents.

*R. A. C. Symes* for the applicant, and *Durance* for the respondents.

*Durance* contended that the accident happened on a building not exceeding 30 feet in height. That being so, under the Act of Parliament the applicant was not entitled to recover.

*Symes* submitted that certain parts of the gas works were over 30 feet in height, and he urged that the whole block should be considered one building, as the Act, he pointed out, applied to any one working on, in, or about such a building.

His Honour: In this case the respondents were contractors appointed by the urban district council to construct the new gas works at Scunthorpe, a large block or group of buildings. The applicant was one of the men employed in the construction by the respondents. At the time of the accident he was engaged in cementing a depression or bed (extending downwards 6 feet from the surface), in what was to be the condenser or exhauster chamber, on which bed the condenser or exhauster was to stand. His particular work was to make the wooden moulds or boxes which inclosed the cement, and to remove them at the proper time from the soft or green cement. Across the top of this sunken bed for the condenser three wooden planks were placed leading to the exit from the condenser chamber. Barrows were wheeled across these planks, and men walked across them. Having removed the last box or mould, the applicant was walking along the planks above described when he slipped, and fell to the bottom of the concrete condenser bed, sustaining thereby a double fracture of the ankle, which incapacitated him from work. The right to compensation under the Workmen's Compensation Act was denied on two grounds—viz. (1) that the building on which he was employed was not 30 feet in height, and (2) that the plank from

which he slipped was not a "scaffolding" within the meaning of the Act. The condenser chamber was not in fact 30 feet high, but it was to be connected by pipes with the boiler-house, from which steam was to come to it, and be thence transmitted to the various subject processes; and there was a tall chimney to the boiler-house about 70 feet high. This chimney was distant from the condenser chamber 22 feet. In support of the first point made against the applicant, the case of *Rixsom* v. *Pritchard* ([1900] 2 W. C. C. 65) was relied on by the respondents. But I consider that case distinguishable, and I shall hold that the condenser chamber, in which the accident occurred, was part of a building over 30 feet in height. In support of the contention that the plank from which the applicant slipped was not a "scaffolding," the following cases were cited: *Wood* v. *Walsh & Sons* ([1899] 1 W. C. C. 68) and *Hoddinott* v. *Newton, Chambers, & Co.* ([1899] 1 W. C. C. 62). On the other side, reliance was placed on the later case of *Maude* v. *Brook* ([1900] 2 W. C. C. 67). In the last-mentioned case, Rigby, L.J., was of opinion that in the construction of a building, planks laid across from one wall to another would be "scaffolding," within the meaning of the Act. I cannot distinguish that in principle from the present case—apart from the question of height; and, according to Smith, L.J., in the same case, the height of the scaffolding is immaterial provided the building in which it is used is over 30 feet in height. In holding, therefore, the plank from which the applicant slipped to be a "scaffolding," it seems to me that I am only applying principles approved by the Lords Justices in the last cited case—though the point was not expressly decided by them. I should mention, in this connection, that the respondents themselves—with full knowledge of all the circumstances of the case—in a letter put in evidence, say to the applicant "the scaffolding you were working on you made yourself." On behalf of the applicant two other points were taken. There was on the gas works, between the gasometer and the condenser house, a portable steam

engine working a centrifugal pump. This was used, not for any purpose connected with the manufacture of gas, but merely temporarily for keeping the foundations of the buildings clear of water during the process of erection; and some of the water pumped up was used in mixing the cement and mortar used for building purposes on the premises. It was contended that this made the whole block of buildings constituting the gas works a "factory" within the meaning of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37, s. 23), and in support of this contention were cited the cases of *McNicholas* v. *Dawson* ([1899] 1 W. C. C. 80) and *Fenn* v. *Miller* ([1900] 2 W. C. C. 55). These cases decide, no doubt, that the machinery itself was a "factory" within the meaning of the Act, and if the applicant had been injured whilst employed "in" or "about" it, he would come within sec. 7 of the Workmen's Compensation Act. But he was not so employed, and had nothing to do with the machinery; and so I shall not base my award in his favour on this ground. It was further contended on his behalf that, by reason of the machinery referred to, the building in which the accident occurred was an "engineering work" within the meaning of sec. 7 of the Workmen's Compensation Act, as those words are defined in the interpretation clause. After enumerating certain works, the clause provides that "engineering work" is to include "any other work for the construction . . . of which machinery driven by steam, water, or other mechanical power is used." Such machinery was used for the construction of the condenser chamber as well as other portions of the gas works. The plain and ordinary meaning of the interpretation clause appears to me to include the present case; and on this ground also I think the applicant entitled to succeed. For the two reasons above stated I give my award in his favour, and I fix the amount of compensation to which he is entitled at £1 per week, his average weekly wages for the nine weeks of his employment having been over £2 2*s*. I

also award him costs, to be taxed on scale B of the higher scale.

See *Hoddinott* v. *Newton, Chambers, & Co.* (p. 74), *Ferguson* v. *Green* (p. 113), *Dredge* v. *Conway* (p. 104), *Cosgrove* v. *Partington* (p. 167).

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March 13, 1901.

## NASH *v.* HOLLINSHEAD.

Before A. L. SMITH, M.R., COLLINS and ROMER, L.JJ.

84 *L. T. R.* 483.

*Factory—Farm—Grinding Grain—By way of Trade or for purposes of Gain.*—SEC. 7.—*Factory and Workshop Act*, 1878, *sec.* 93.

Farming is not a trade.

The "gain" referred to in sec. 93 of the Factory and Workshop Act, 1878, is only a direct gain.

Turning grain into meal is not either making, finishing, or adapting for sale an article (per A. L. Smith, M.R.).

THIS was an appeal by the employer from a decision of the Judge of the St. Albans County Court awarding compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employ of the respondent, who was a farmer. On his farm the respondent had a steam engine which he used for various purposes. On the occasion when the accident happened, which was the subject of the present claim, the engine was being used to turn a mill for grinding meal. The meal was not sold, but was used solely for the purpose of feeding the cattle on the farm. The applicant was employed in attending to the machine, and in the course of his employment he met with the accidental injury for which he claimed compensation.

The County Court Judge held that the grinding of the meal was done "for purposes of gain" within sec. 93 of the Factory and Workshop Act, 1878, so as to make the farm a "non-textile factory" within that Act, and that therefore the employment of the applicant was "on or in or about a factory" within the Workmen's Compensation Act, 1897; and he accordingly awarded the workman compensation for his injuries.

The respondent appealed.

The Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), provides as follows:

Sec. 93. . . . The expression "non-textile factory" in this Act means . . . (3) also any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes . . . and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) provides as follows:

Sec. 7.—(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on, or in, or about a railway, factory . . . (2) In this Act . . . "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891. . . .

*W. Ellis Hill*, for the respondent: The only question is whether this farm is a "non-textile factory" within sec. 93 of the Factory and Workshop Act, 1878. To bring the farm of the respondent within the definition there given, the applicant must at all events show that the respondent was having the meal ground "by way of trade or for purposes of gain." It was not done "by way of trade," because the word "trade" implies buying and selling or making articles for the purpose of sale, and it has been found as a fact in the present case that the meal was not sold by the respondent, but was made simply for the use of the cattle on the farm: *Wells* v. *Parker* (1 T. R. 34), *Kent* v. *Ashley*

(21 L. T. R. 425; L. R. 5 Q. B. 19). Neither was the meal ground "for purposes of gain" within the Act. It is true that if the words are taken in their widest sense they would cover the present case. In one sense everything a man does to benefit himself may be said to be done "for purposes of gain." It is obvious, therefore, that some limit must be put on these words as used in the Act. I submit that the word "gain" is here used with reference to selling. It is a narrower word than "trade," which usually implies buying as well as selling. At all events, "gain" must be used here as implying some direct profit, not the indirect profit which the respondent made by feeding his cattle on meal instead of on the whole grain. If a farm is a "non-textile factory" within sec. 93, then all the provisions of the Factory and Workshop Act, 1878, would apply to it, such as secs. 13, 14, 22, 75, 76, 77, and 78. It would be an absurdity to apply those sections to a farm, and if the construction which the applicant contends for would lead to an absurd result, the Court will not give such a construction to the Act, though otherwise the words of the Act may be capable of it: *Ferrand* v. *Hallas Land and Building Company* (69 L. T. R. 8; [1893] 2 Q. B. 135).

*Cecil Fitch*, for the applicant: The ground of the decision in *Kent* v. *Ashley* (*ubi sup.*) was that the place in question was an open air slate quarry. If the work there done had been done in a building, it would have been held to have been done in a factory. The grinding of the meal in the present case was "for purposes of gain." The word "gain" is a wider word than "profit." It includes a saving of money. Anything done by a man for his greater convenience is done for purposes of gain. The respondent might have bought his meal ready ground, but no doubt he found it better or cheaper to grind the grain himself, and he therefore ground it "for purposes of gain." He cited *Rogers* v. *Manchester Packing Company* (78 L. T. R. 17; [1898] 1 Q. B. 344).

SMITH, M.R.: I cannot agree with the view taken by the County Court Judge. The question is whether a tenant farmer, using a steam engine on his farm, as the respondent does, carries on the business of a "non-textile factory" within the meaning of the Factory and Workshop Act, 1878. Before the question was raised in the present case no one would ever have thought of putting forward such a contention, but it is now argued, for the first time since that Act was passed, that all farmers who since 1878 have used steam engines for cutting chaff, or for any other purpose for which steam engines are used on farms, have been carrying on the business of non-textile factories. The suggestion is now made for the purpose of making a farmer liable under the Workmen's Compensation Act, 1897, which, by sec. 7, applies to employment "on, in, or about a factory," the word "factory" being defined by the same section as having the same meaning as in the Factory and Workshop Acts, 1878 to 1891. The question, therefore, is whether the applicant, who was employed in attending to the engine which the respondent used to grind meal, was employed on, or in, or about a factory within the meaning of the Factory and Workshop Act, 1878. By sec. 93 of that Act the expression "factory" means textile factory and non-textile factory, and non-textile factory is defined as follows: (His Lordship read it.) Can it reasonably be said that the operation on which the applicant was engaged comes within that definition? It seems to me impossible. The whole of sub-sec. 3 is, in my opinion, governed by the words "by way of trade or for purposes of gain." Now, the labour was clearly not being exercised "by way of trade," because, as the County Court Judge has found, the meal was being ground, not for sale, but solely for the purpose of feeding the respondent's own cattle. Then it was said that the grinding was done "for purposes of gain," because, as the cattle feed better on meal than on the unground grain, the respondent made a gain by means of the improvement of the animals, which

was due to their being fed on meal. It seems to me that the word "gain" is used in this section as meaning a direct gain, not an indirect gain such as accrued to the respondent in the present case. I think it would require a great straining of language to make the definition of non-textile factory in sub-sec. 3 cover the operation on which the applicant was engaged. Some of the sections in the Act have been referred to in the course of the argument as showing the ludicrous result which would be caused if we were to hold a farm, on account of this operation, to be a non-textile factory. In such a case sec. 13, as to the hours of employment and meal time; sec. 22, as to holidays; sec. 75, as to notices to the inspector of factories; sec. 76, as to regulation of hours by a public clock to be set up in the factory; and sec. 78, as to affixing an abstract of the Act in the factory, would all be applicable to a farm. All those sections are quite inappropriate to a farm. It seems to me impossible to hold that this farm was a non-textile factory within sec. 93 of the Factory and Workshop Act, 1878, and as the employment on which the applicant was engaged does not come within sec. 7 of the Workmen's Compensation Act, 1897, the appeal must be allowed.

COLLINS, L.J.: I am of the same opinion. Even if the words of sec. 93 were capable of embracing this transaction, the result of holding that this case was within the Act would be so absurd as to drive one to the conclusion that the Act was never intended to embrace such a case. For that reason we ought to hold that the case is not within sec. 93. It was on a similar principle that the case of *Ferrand* v. *Hallas Land and Building Company* (69 L. T. R. 8; [1893] 2 Q. B. 135) was decided. It was there argued that a sewer made by the owners of certain houses, in order to drain them properly and so make them more valuable, was made for the "profit" of the owners within sec. 13 of the Public Health Act, 1875. The Court decided that to hold that would cause so many anomalies, having regard to other provisions in the Act, that it must be held

that the Act could not have been intended to have the effect which the plaintiffs contended for. The same kind of argument is applicable to the present case on the meaning of the words "for purposes of gain." It is true that the grinding of the meal was done with the view of improving the feeding of the cattle, and so indirectly increasing the respondent's profits. But though the words are wide enough, if taken literally, to cover the present case, weight must be given to the context in which the words appear. The Act was intended to apply to places in the nature of manufactories, and the elaborate provisions made for the carrying on of such places throw light on the objects which the Legislature had in view in passing the Act. In the section which defines the meaning of the word factory, a long catalogue is given of manufactories of various definite kinds, and then come the general words under which the applicant seeks to bring in the present case. The general provisions of the Act which are to apply to factories are of such a kind that it would be absurd to apply them to a farm. Besides that, when the Act was passed the Legislature must have been well aware of the facts that farming operations are in these days largely carried on by means of steam engines, and that farming is one of the largest industries in the country; yet farming has not been specially introduced among the named list of definite businesses to which the Act applies, and the general clause of sec. 93 is such that it cannot be construed so as to include farming without great straining of the words. In view of these considerations, I do not think that we can hold that the Legislature intended the Factory and Workshop Act, 1878, to apply to farms, and as the definition of factories has been merely taken out of that Act for the purposes of the Workmen's Compensation Act, 1897, I do not think there is any ground for saying that the present case comes within the last-named Act.

Romer, L.J.: I agree. I have nothing to add, except that I wish to say that I give no opinion as to what might

have been the result if the grinding of meal had been carried on by the respondent with the view of selling the meal as an article of commerce.

Appeal allowed.

Solicitor for the applicant, *H. W. Lathom*, Luton.

Solicitors for the respondent, *Heath & Hamilton*, for *Brigg & Remon*, Harpenden.

Also reported (1901) 1 Q. B. 700; 70 L. J. K. B. 571; 84 L. T. R. 483; 49 W. R. 424; 65 J. P. 357.

The work of a farm labourer is now within the Workmen's Compensation Act, 1900 (63 & 64 Vict. c. 22).

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May 3, 1901.

## LAW *v.* GRAHAM.

Before LORD ALVERSTONE, C.J., and LAWRANCE, J.

84 *L. T. R.* 599.

*Manufacturing Process—Adapting Article for Sale.*—SEC. 7, 2.—*Factory and Workshop Act*, 1878, *sec.* 93.

Even if the filling of bottles with beer on premises occupied by wholesale and retail beer dealers be "incidental to the adapting of or sale" of an article, the washing out of the bottles by mechanical power is not in aid of the manufacturing process carried on there, and therefore such premises are not a "factory."

CASE stated upon an information preferred by the appellant against the respondents for that they, being the occupiers of certain bottling works, the same being a factory within the Factory Acts, did fail to have affixed at the entrance the prescribed extract of the Acts.

On the hearing of the information the following facts were proved or admitted:

The respondents were the occupiers of the premises referred to in the information, which they used solely for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers.

Before the bottles were filled with beer, which was done by manual labour alone, they were washed by manual labour with the aid of mechanical power. The bottles were washed inside by a rotary brush driven by a small gas engine, and were held in position by hand. The washing of the outside of the bottles was effected by manual labour only.

Nothing was done to the beer itself to in any way alter its nature or character for the purpose of adapting it for sale.

No process of any kind, manufacturing or otherwise, was carried on on the premises, beyond that of washing bottles and bottling beer as already described.

The respondents had not the prescribed abstract of the Factory Acts fixed at the entrance of their premises in the prescribed form.

If the premises came within the definition of a factory under the Factory Act, 1878, sec. 93, sub-sec. 3 (*c*), then the respondents had infringed the provisions of sec. 78 of the Act.

It was contended for the respondents that their premises were not a factory within the meaning of the Act for the following reasons: (1) That nothing was done to the beer itself "to adapt it for sale;" (2) that washing the bottles and bottling the beer was not "adapting the beer for sale;" (3) that no manufacturing process was carried on on the premises.

The appellant contended that washing the bottles and filling them with beer in the manner before described was "adapting the beer for sale," and was also a "manufacturing process" within the meaning of the Act, in aid of which mechanical power was used.

The Justices were of opinion that, according to the tone, intent, and meaning of sub-sec. (3), something must be done to the article itself for the purpose of adapting it for sale, and that, even assuming filling the bottles with beer was adapting the beer for sale, the premises were not a

factory, inasmuch as the bottling was effected by manual labour alone, without the aid of mechanical power. They were also of opinion that no manufacturing process was carried on on the premises, as in the absence of any definition in the Act of the phrase "manufacturing process" the words must be construed in their ordinary sense: *Spencer* v. *Livett* (82 L. T. R. 75; [1900] 2 W. C. C. 112).

They therefore held that the respondent's contention on each point was right, and gave their determination against the appellant as before stated.

The definition of a factory is contained in sec. 93 of the Factory and Workshop Act, 1878, which says that the expression "factory" means "textile factory" and "non-textile factory," or either of such descriptions of factories. "Non-textile" factory means:

(1) Any works, warehouses, furnaces, mills, foundries, or places named in part 1 of the 4th schedule to this Act. (2) Also any premises or places named in part 2 of the said schedule wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there. (3) Also any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for the purposes of gain in or incidental to the following purposes, or any of them; that is to say—(*a*) in or incidental to the making of any article, or part of any article; or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or (*c*) in or incidental to the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

*H. Sutton*, for the appellant: These premises were within the definition of a "non-textile factory," for manual labour was exercised for making an article—viz. bottled beer—and if it was not making an article it was adapting beer for sale. Mechanical power was used in aid of the process. In *Petrie* v. *Weir* (Ct. Sess. Cas. 5th Series, vol. 2, 1041) the premises consisted of a yard in which stones were dressed by manual labour, and included an engine-house where the workmen's tools were sharpened on a

grindstone driven by a gas-engine. No other mechanical power was used in the premises, but they were held to be premises in which mechanical power was "used in aid of the manufacturing process carried on therein" within the meaning of the Factory and Workshop Act, 1878, sec. 93 (3). That case, I submit, is conclusive.

*Travers Humphreys* for the respondents.

LORD ALVERSTONE, C.J.: This is one of the Acts in which we have to construe language which is very near the line, and if one could find any guide from any general object of the Act, as to giving the words a very wide interpretation, then I think it would be quite possible in many cases to bring processes within these words as factories which at first sight they were not perhaps intended to apply to. We have not any real guide here, but have to take the section as it stands. I think two conditions must concur, either (*a*), (*b*), or (*c*), and the last words of the section. I think it is plain that bottling beer was not incidental to the making of an article, and it is not "the altering, repairing, ornamenting, or finishing of any article." I doubt if it can be said to be incidentally adapting it for sale, but I think it is possible that if that were the only thing in the section, to take the view that where casks of beer were brought in wholesale and bottles provided, the putting the beer into the bottles might be an adaptation of the article for sale by a strained meaning of the words. Then, assuming that that is satisfied, you have to construe the additional words: "And wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." I think that, having regard to what we have seen before in the other part of the schedule and the section as to the manufacturing process, that the washing of the bottles by mechanical means fails to be fairly called a process which is used in aid of the bottling of the beer. It is true that the bottles ought to be clean, and that they wash the bottles because they are going to

put beer into them, but it is not "in aid of" in the sense used in this section. Therefore, though I admit the point is near the line, I think the magistrates are right. Now, with regard to the Scotch case, I do not wish to be thought to dissent from it, because I can see in one sense that the actual condition of the tools might have a good deal to do with the dressing of the stone for sale, and whether I should have decided the Scotch case in the same way or not I need not now consider. I do not in what I have said intend to overrule the Scotch case, because I think that some distinction may be drawn between that and the one now before us. I think our judgment must be in favour of the decision of the magistrates.

LAWRANCE, J.: I agree.

Appeal dismissed.

Solicitors: *The Solicitor to the Treasury; Pyke & Parrott.*

Also reported (1901) 2 K. B. 327; 70 L. J. K. B. 608; 84 L. T. R. 599.

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June 24, 1901.

## RAINE *v.* JOBSON & COMPANY.

Before EARL OF HALSBURY, L.C., LORDS MACNAGHTEN, SHAND, BRAMPTON, and LINDLEY.

17 *T. L. R.* 627.

*Factory—Ship in Dock.*—SEC. 7, 2.

Employment on a ship in a dock is within the Act.

(*Flowers* v. *Chambers* [1899] 1 W. C. C. 51 and, on this point, *Medd* v. *McIver* [1899] 1 W. C. C. 76 and *Durrie* v. *Warren* [1899] 1 W. C. C. 78, overruled.)

THIS was an appeal brought from an order of the Court of Appeal, Lords Justices A. L. Smith and Collins, which ordered that the award of Judge Meynell, the Judge of the

County Court of Durham, holden at West Hartlepool, made in an arbitration under the Workmen's Compensation Act, 1897, in favour of the respondents, should stand. The facts as shown by the application for arbitration, and the notes of the learned County Court Judge, were briefly as follows: The respondents carry on business as ship repairers on premises occupied by them at West Hartlepool. The respondents' works adjoin a honeycomb of dock premises, all belonging to the North Eastern Railway Company; the actual waters of the dock being distant about 150 yards from the respondents' works. The respondents have no dock of their own. When they are about to effect repairs on a vessel, and it is necessary to have the vessel in a dry dock, their practice is to hire a dry dock from the North Eastern Railway Company, for which they pay dues. This practice was followed on the present occasion. The dry dock so hired by them, where the accident in question took place, is part of the said dock premises, distant by road from the respondents' works about 744 yards. The dry dock is provided with dock gates, a steam crane, pumping machinery, and a blacksmith's shop, all the property of the North Eastern Railway Company. On January 29, 1900, the respondents were, for the time being, in exclusive occupation of this dry dock for the purpose of examining and cleaning the bottom of a damaged steamship, and dues for such occupation were paid by them to the North Eastern Railway Company. The water had been pumped out of the dock and the vessel duly shored up by the respondents' workmen. During the process of the examining and cleaning of the vessel the appellant's husband, a labourer in the employment of the respondents, at their works, and then at work on the vessel, was directed to go ashore for some paraffin; and whilst he was walking along a plank connecting the vessel with the side of the dock the plank tilted and he fell to the bottom of the dock, sustaining injuries from which he died on February 15 following. The deceased workman left a

widow, the appellant, but no children, and in the event of its being adjudged that she is entitled to compensation it was admitted that the amount thereof under the Workmen's Compensation Act, 1897, is £150. At the time of the accident neither the blacksmith's shop nor the steam crane was in actual use; but these and the other appliances above mentioned are ordinarily used in the repairing and other processes carried on in the dry dock. It was decided by Judge Meynell, on the authority of *Flowers* v. *Chambers* ([1899] 1 W. C. C. 51) and *Spencer* v. *Livett* ([1900] 2 W. C. C. 112), that the deceased at the time of the accident was not employed on, in, or about a factory within the meaning of the Act, and his decision was upheld by the Court of Appeal.

Mr. *R. J. Simey* and Mr. *J. A. Johnston* were for the appellant; Mr. *Ruegg, K.C.*, and Mr. *Edward Shortt* for the respondents.

The Lord Chancellor, in moving that the decision of the Court of Appeal should be reversed, said that some difficulty had arisen from the artificial mode in which the Legislature had applied various sections of various Acts as ancillary to the Workmen's Compensation Act, and he quite agreed that it would appear from that Act of Parliament that it was not within the contemplation of that Statute to deal with the relation of shipowners and sailors when engaged in their ordinary occupation as sailing upon the seas, or to bring that within the Statute at all. But, although he quite agreed that this was the true view of what this Act of Parliament had done, it seemed to him that it would be an extraordinary consequence of that supposed omission that everything done in, upon, or near a ship was to be excluded from the Act of Parliament. It would be, to his Lordship's mind, an extraordinary extension of that immunity, that because it happened to be a ship which was concerned it should be excluded from the Act of Parliament in general. He knew of no rule which should make such a course necessary. There was here a firm, part of whose business

consisted in the repair of ships. For that purpose they hired a dock. He did not care for what purpose they hired it. Whether there was a ship in it or not, they were engaged in some performance in which they required the use of the dry dock. In the course of that employment they would clearly, within this Act, be bound to pay compensation in case of the death or injury of a workman; and the fact that it was the case of a ship was, to his Lordship's mind, absolutely irrelevant. The respondents were at that moment the hirers of a dry dock. The plaintiff assumed that the ship was to be put into dry dock to be cleaned and repaired; and for the purpose of cleaning the external part of the ship had to be protected, and the dry dock was the ordinary machinery for doing so. This man was a hired labourer. He was sent from the ship to the land down a gangway. The gangway slipped, and he was precipitated down and killed. Assuming a dock to be within the Statute—and as to that there was the frank and proper admission that this dock, under the Act, was a "factory" within the meaning of the Statute—there was a man killed by an accident in the factory—which factory was a dock—and the accident happened in the course of his employment, while he was employed by the persons hiring the dock for the purpose of their trade. He had not been able to follow the train of reasoning of the respondents' counsel that because the wooden structure inside that dock was a ship, it ought, as if it were on the sea, to be treated as a separate entity. Why that was to convey to the dock in which it was placed the immunity which the ship itself possessed while sailing on the high seas he was unable to understand. The dry dock was not the sea, and it formed no part of that subject-matter to which immunity was attached by the Statute. The dry dock was the ordinary piece of machinery of which the respondents were in occupation or had the use. Every element was satisfied by the facts of this case which was required to give the right to compensation.

LORD MACNAGHTEN: I am of the same opinion. The respondents, Messrs. Jobson & Co., are ship repairers at Hartlepool. They have a place of business there which in their evidence they call "a manufactory for the repair of ships;" but I do not think it can be described as "a factory which is a shipbuilding yard," to use the expression which occurs in sec. 7, sub-sec. (3) of the Act. Having no water frontage, they have no means of launching a vessel, nor have they any place of their own into which they can take a vessel for repair. When employed to repair a vessel which requires to be dry-docked, they hire a dock from the North Eastern Railway Company, who seem to own all the dock accommodation in Hartlepool. That is what was done in the present case. Jobson & Co. hired a dry dock, and were cleaning or repairing a vessel in it. A workman employed by them on this job—a labourer, but none the less a workman—met with personal injury by an accident. He slipped off a sort of gangway, fell into the dock, and was killed. Why is that not a case for compensation under the Act? If you translate the account of the accident from ordinary language into the phraseology of the Statute, it seems to come under the very words of the enactment. The dock was a "factory" because it was "a dock to which some provisions of the Factory Acts is applied by the Factory and Workshop Act, 1895." Messrs. Jobson were "undertakers" because they had at the time "the actual use and occupation of the dock." The accident happened to a workman "in" the dock, and it was an accident "arising out of and in the course of" his employment. I agree with Mr. Ruegg that it is difficult, if not impossible, to reconcile the case of *Merrill* v. *Wilson* (*post*, p. 155) with *Flowers* v. *Chambers* ([1899] 1 W. C. C. 51), and of the two I prefer the later case. I think the decision under appeal must be reversed.

LORD SHAND said that it was not disputed that the dock was a "factory" within the meaning of sec. 7 of the Statute, which provided that "factory," as therein defined,

had the same meaning as in the Factory and Workshop Act, 1895. The provisions of the Act of 1895 had been shown to apply to docks, and the only question left was whether the defendants were "undertakers" within sect. 7. In his Lordship's opinion they were. He could not see any ground for holding that the respondents were not also "occupiers" within the words of the Act. The case was entirely different from that of a ship at sea.

LORD BRAMPTON, in concurring, said that the suggestion made by the respondents' counsel that it was not the dock, but only the berth, which was hired, had not been made below, and it was not competent to raise it for the first time in this House.

LORD LINDLEY also concurred, and the appeal was allowed.

Solicitors: *Charles H. Dodd*, for *J. J. Dodd*, West Hartlepool, for the appellant; *William Hurd & Son*, for the respondents.

Also reported 70 L. J. K. B. 771; 17 T. L. R. 627. The case will probably be reported elsewhere in due course.

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April 19, 1901.

## TENCH *v.* FISH.

### Before His Honour JUDGE HOWLAND ROBERTS.

*The Law Times, May* 11, 1901.

*Warehouse—Yard.*—SEC. 7, 2.—*Factory and Workshop Act*, 1895, *sec.* 23.

A warehouse is something that comes within the class "house."
An uncovered railway goods yard is not a warehouse.
*Obiter dicta*; a covered railway goods shed is a warehouse.

THIS case was heard at the Wolverhampton County Court, on April 19. Applicant was a labourer employed by respondents, who are builders. A quantity of large blocks of

stone was consigned last November, per Midland Railway, to respondents, and, not being immediately required, were left by respondents in the goods yard of the railway company, who charged the respondents with storage rent for them. The stone was heaped up in the goods yard by the side of the railway siding where it was unloaded. The goods yard is inclosed, but not covered. There is inside the inclosure of the goods yard, but distant 115 yards from the place where the stone was stored, a covered goods shed, used for loading and unloading, and also sometimes for storing perishable goods. The stone never was in the shed. On January 8 respondents sent applicant with others of their workmen to load the stone on a dray to convey it about half a mile to the building operations. A movable crane belonging to the railway company and moving on the railway lines was brought by the company to the place where the stone was lying, and was then handed over to the respondents' workmen, who had sole charge of it in raising the stone from the ground and loading it in the dray. While the stone was being raised by the crane, a block accidentally fell on the applicant, seriously injuring him. The above facts were admitted. Applicant's solicitor tendered evidence to show (1) that applicant had on a previous occasion met with a similar accident in the same place, and had been compensated by the respondents under the Act; (2) that the inspector under the Factory and Workshop Acts had exercised the powers of the Acts in respect of this and similar premises, and that notice of the accident in respect of which the claim was made had in fact been given by the respondents to the inspector, but this evidence was objected to and rejected by the judge.

*C. N. Wright* (Wolverhampton), for the applicant, argued that the railway company were warehousemen of goods carried by them after the termination of the transit, and that the place where such goods were usually stored by them as such warehousemen was a warehouse

to which the Factory and Workshop Acts applied, and therefore came under the definition of a factory under sec. 7 of the Workmen's Compensation Act. Further, that the crane used for loading and unloading the stone was a factory under sec. 23 of the Factory Act, 1895; and, alternatively, that if the place where the stone was stored was not a warehouse, it was part of the curtilage of the goods shed, which was undoubtedly a warehouse, and therefore was "in or about" the warehouse within the meaning of the Act.

*Kentish Wright* (Nottingham), for respondents, argued that there could not be a warehouse without a building; that although a technical and legal meaning was attached to the verb "to warehouse" equivalent to "store as a bailee for reward," that technical meaning was never extended to the substantive "warehouse," but that, both by the dictionaries and in common parlance, a warehouse always signified a building; also, quoting a dictum of Collins, L.J., in *Haddock* v. *Humphrey* ([1900] 2 W. C. C. 77), that if a timber yard were roofed it would be a warehouse, that, on the authority of *Flowers* v. *Chambers* ([1899] 1 W. C. C. 51) and *Hennessey* v. *McCabe* ([1900] 2 W. C. C. 80), machinery used in loading or unloading did not become a factory unless it was loading or unloading to or from a wharf, dock, quay, or warehouse, and, this not being a warehouse, the use of machinery did not constitute a factory; that inasmuch as the goods yard was extensive and used largely independent of the goods shed, it could not be called curtilage of the goods shed, and that, as the stone had never been in the goods shed and the accident happened 115 yards away, the employment was not in or about the warehouse: *Fenn* v. *Miller* ([1900] 2 W. C. C. 55).

His Honour considered that it was essential that the substantive "warehouse" should be something which fell within the class "house." "Ware" was adjectival, or added merely to describe or qualify the particular species of "house" referred to. As the place where the stone

was stored was therefore not a warehouse, the use of machinery in loading did not constitute a factory. The goods shed was undoubtedly a warehouse, but, as the use of the goods yard was not wholly subsidiary to the use of the goods shed or warehouse, it could not be called the curtilage of the goods shed, and, as the stone was stored 115 yards from the shed and had never had any connection with it, the employment of loading the stone was not employment in or about the shed. If the stone had been stored by the shed because there was not room inside, or if it had been intended at any time to put it in the shed, it might be held to be "in or about," but that was not this case. Further, if the Legislature had intended the Act to apply to goods yards and sidings, it would, in his opinion, have so stated in express words, and not left it to be inferred by analogy. No claim had ever hitherto, so far as he knew, been made that open yards came under the Act, and this claim, if allowed, would vastly extend the operation of the Act in a way that he did not believe was ever intended. He gave judgment for respondents.

See *Smith* v. *Turner* (*infra*).

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December 13, 1900.

## SMITH *v.* TURNER.

### Before His Honour Judge Wightman-Wood.

*The Law Times, December* 29, 1900.

*Warehouse—Connection with Docks, etc.*—Sec. 7, 2.—*Factory and Workshop Act*, 1895, *sec.* 23.

The Act applies only to such warehouses as are connected with a dock, wharf, or quay.

At the Leicester County Court, on December 13, 1900, his Honour gave his decision in this case, heard at a previous sitting of the Court. The amount of the claim

was £50 for loss sustained through the death of a son of the applicants' from injuries received while in the employ of the respondents.

His Honour said, although the amount of compensation claimed was not large, the principle involved was important. At the hearing one question raised was whether the father and mother of the deceased were dependent upon him, seeing that he was only earning 6*s*. per week, but he thought there was no doubt that they received some benefit from the earnings, and were dependants within the meaning of the Act. The important question was whether the deceased was in employment which was covered by the Act. The respondents carried on business as importers of elastic thread, and the boy received his injuries, which terminated fatally, through falling downstairs from a workshop where the thread was made up for sale. A "workshop" was not within the meaning of the Act, but on either side of the workshop in question was a room in which the elastic was stored. The larger of these rooms was not more than 40 feet by 10 feet, and the question was whether this was a "warehouse" within the meaning of the Act. The definition of the word "factory" in the Act was a puzzle. It included "warehouses to which any provision of the Factory Acts is applied," but some provisions of the Factory Acts were applied to "every dock, wharf, quay, and warehouse." Yet it appeared clear that the Workmen's Compensation Act was not intended to apply to all warehouses, or it would have said so without any qualifying words. It was, however, very difficult to ascertain the true meaning of the Act on this point. It was an extraordinary piece of drafting. It was evident that there were some warehouses to which the Act was not intended to apply; but what were they? He thought some clerical mistake had occurred in the drafting of the Act, or that some inadvertent amendment had been made in the small hours of the morning in the House of Commons. How the difficulty of construing the definition escaped the Law Lords

when the Bill passed the House of Lords he could not understand, but the definition had got there, and he now had to deal with it. The rooms where this boy was employed were store rooms, and he did not know that they did not fall under the word "warehouse" in ordinary parlance. But if the Act did apply to such warehouses as that, then, of course, it had most extensive operations, far beyond what any one supposed it to have. But he thought what was intended by the word "warehouse" in the definition of "a factory" was warehouses connected with docks, wharves, and quays. If the respondents' warehouse fell within the Act, then it would be a most serious thing for a number of employers, and would give benefits to a large class of workmen who it was not hitherto supposed benefited under the measure—men who were not employed in any trade that was in any way dangerous. Therefore he held that the word "warehouse" under the Act did not apply to the business premises of the respondents. The claim for compensation, therefore, failed. In case the action was carried further he would fix the compensation, if the applicants were entitled to any, at £20, £10 for the father, and a similar sum for the mother.

His Honour Judge Addison, K.C., and other arbitrators have held the same opinion.

See *Tench* v. *Fish* (*ante*, p. 140).

November 13, 1900.

## CARRINGTON *v.* BANNISTER & COMPANY.

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 457.

*Undertaker—Occupier—Machinery—Loading from Quay—Factory.*—SEC. 7, 2.—*Factory and Workshop Act*, 1895, *sec.* 23.

A person using machinery belonging to another for the purpose of unloading from a quay is the occupier of the machinery.

THIS was an appeal by the respondents in the County Court from a decision of the Judge of the Grimsby County Court awarding compensation under the Workmen's Compensation Act, 1897.

The applicant was a coal tipper, and was accidentally injured while working in the employment of the appellants upon a travelling hydraulic crane in Grimsby Docks.

The docks and the crane belonged to a railway and dock company.

The appellants were coal shippers, and at the time of the accident in respect of which the applicant claimed compensation were engaged in loading with coal a ship that was lying in the docks. The coal was brought in railway trucks on to the quay, and underneath the crane by the ship's side, and the crane was used for raising the trucks one by one, and tipping their contents into the ship.

The operation of loading the ship took two days.

The applicant was working on the crane under a ganger who was in the service of the appellants.

The County Court Judge found as a fact that, during the operation of loading the ship, the applicant was under

the direction and control of the ganger, and that the appellants' gang had possession and sole control of the entire machine until the particular job on which they were employed was finished.

He then held that the crane was a "factory" within the meaning of the Factory and Workshop Acts, 1878 to 1891, and that the appellants at the time of the accident were "occupiers" of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. He therefore held that the employment of the applicant was one which came within sec. 7 of the Workmen's Compensation Act, 1897, and accordingly awarded compensation.

The appellants appealed.

The Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), provides as follows:

Sec. 23. The following provisions—namely, . . . shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process; and (*b*) any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides as follows:

Sec. 7.—(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on, or in, or about a railway, factory, . . . (2) In this Act . . . "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895

. . . "undertakers" . . . in the case of a factory means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895.

*Ruegg*, Q.C., and *E. L. Hartley*, for the appellants: We admit that this crane was a "factory" within the meaning of the Factory and Workshop Acts, 1878 to 1891; but we contend that the appellants were not the "occupiers" of it within the meaning of the Factory and Workshop Acts, 1878 to 1895. If they were not "occupiers" of the crane they were not "undertakers" within sec. 7 of the Workmen's Compensation Act, 1897, and are not liable to pay compensation under that Act. There is no definition of the word "occupier" in the Factory Acts, and it cannot have been intended by the Legislature, in enacting sec. 23 of the Factory and Workshop Act, 1895, to make a person who uses a machine such as the appellants were using, only for two days, the "occupier" of it, so as to bring him within the provisions of the Factory Acts, and throw upon him the duty, which is imposed by those Acts on occupiers of machinery, of fencing it when dangerous, and other duties of that sort (see secs. 81 and 82 of the Factory and Workshop Act, 1878). Sec. 23 cannot be construed so as to make the appellants the "occupiers" of this crane. It is only the last provision in that section that can possibly be relied on as having that effect, and in that provision the words "such machinery," as last used therein, refer, we submit, to "such machinery" and "the machinery" mentioned just below—*i.e.* to the machinery named in clause (*b*). There is no reference in the latter part of the section to "machinery and plant," the phrase used in clause (*a*). "Such machinery" should not be construed as referring to "machinery and plant." The crane used by the appellants clearly does not come within the kind of machinery mentioned in clause (*b*), and admittedly it does come within clause (*a*). Sec. 23 contains no provision as to who is to be deemed the occupier of the "machinery and plant" mentioned in clause (*a*), but there is nothing in it to show

that the railway and dock company who own this crane are not occupiers of it. The County Court Judge did not direct himself rightly in this matter. He found as a fact that the appellants were in possession and sole control of the crane, and then he seems to have thought that that fact was enough to constitute the appellants the "occupiers" of the crane within the meaning of the Factory Acts.

*H. S. Cautley*, for the applicant, was not called upon.

A. L. SMITH, M.R.: The question in this case, which turns on the findings of fact by the County Court Judge, is whether the appellants were the "occupiers" of the machinery when the accident happened for which the applicant seeks compensation. For the two days during which the machinery was being used for the loading of the ship, the appellants, as the County Court Judge has found, had the possession and sole control of it. The machinery is admitted by the appellants to be a "factory" within the meaning of that word as used in the Factory and Workshop Acts, 1878 to 1891. The sole point taken by the appellants on this appeal is that there is no evidence that they were "occupiers" of it. Now the question here is not whether in every case possession in fact is sufficient to constitute occupation, but whether on the facts of the present case the appellants were in occupation of this factory within the meaning of the Factory Acts. If they were "occupiers" within those Acts, then they were "undertakers" within sec. 7, sub-sec. 1, of the Workmen's Compensation Act, 1897, and are liable under that Act to compensate the applicant, because "undertakers" in that Act in the case of a factory means "the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895." Now sec. 23 of the Factory and Workshop Act, 1895, provides as follows: [His Lordship read it.] The crane on which the applicant was injured comes within the description of the machinery and plant mentioned in clause (*a*) of that section, and not within clause (*b*). It is

contended that the machinery mentioned in the latter part of sub-sec. 1 which follows (*a*) and (*b*) has reference solely to the machinery mentioned in (*b*), and does not refer to the "machinery and plant" mentioned in (*a*). I cannot see why that should be so. It seems to me that the words "the machinery" and "such machinery" in the latter part of sub-sec. 1 must have reference to the machinery mentioned in the earlier part of the section, including the machinery mentioned in (*a*). The point raised for the appellants seems to me to be a hopeless one, and I think that the appeal must be dismissed.

COLLINS, L.J.: I am of the same opinion. It would be a very remarkable thing if the Legislature, after constituting two classes of things "factories" so as to be within certain provisions of the Factory Acts, had sedulously gone out of its way to enact twice over that a person using one class should be deemed to be the "occupier" of a factory and then had omitted to say anything as to who should be considered the "occupier" of the other class. But that would be the result of the argument that was put forward on behalf of the appellants. The enactment that the machinery and plant used in the process of loading and unloading from or to a dock, wharf, quay, or warehouse shall be included in the word factory would be barren unless a person using the machinery and plant were brought within the meaning of the word "occupier" of a factory. After providing that the things named in (*a*) and (*b*) shall be deemed to be factories, the section goes on to provide that the persons using the things named in (*b*) shall be considered the occupiers. There is no need for the Legislature after that to go on to provide for the same thing over again, and therefore I think that in the rest of the section the Legislature was referring to the provisions of clause (*a*), and intended to provide who should be considered to be occupiers of the things named in (*a*). The words "such machinery" must, in my opinion, refer to the machinery and plant named in (*a*). It was necessary

to make some enactment as to who should be considered the "occupiers" of that machinery and plant, and if the latter part of sec. 23 does not contain that enactment, the section can only be construed as needlessly enacting twice over who should be deemed occupiers of the things named in (*b*).

STIRLING, L.J.: I agree. The argument seems to me to depend upon the use of the word "plant" in connection with the word "machinery" in clause (*a*) and the use of the phrase "such machinery" without the repetition of the word "plant" just at the end of the section. I think that that phrase "such machinery" clearly refers to the machinery mentioned in clause (*a*), and was intended to embrace the word plant with which the machinery there mentioned is joined.

Appeal dismissed.

Solicitors for the applicant, *Rollit & Sons*, for *Brown & Son*, Great Grimsby.

Solicitors for the appellants, *Busk, Mellor, & Norris*, for *Slater, Heelis, & Co.*, Manchester.

Also reported (1901) 1 Q. B. 20; 70 L. J. Q. B. 31; 83 L. T. 457.
See *Hanson* v. *Great Central Railway Company* (*post*).
See *Francis* v. *Turner* ([1900] 2 W. C. C. 61).

July 9, 1901.

## HANSON *v.* GREAT CENTRAL RAILWAY COMPANY.

Before His Honour JUDGE SHORTT.

*Factory—Machinery—Undertaker—Occupier.*—SEC. 7, 2.—SEC. 4.

If the owners of machinery which is a "factory" temporarily cease to occupy it and give up possession of and control over it to a contractor with whom they have entered into a contract within sec. 4 of the Act, they still remain liable as "undertakers."

THIS case was heard at the Great Grimsby County Court, on June 12, 1901.

*Appleton* for the applicant; *Minton-Senhouse* for the respondent.

The facts, so far as the point raised is concerned, are identical with those in *Carrington* v. *Bannister* (*ante*, p. 146 (*q.v.*)).

On July 9, 1901, his Honour made the following award:

The applicant was one of a gang of men employed by William Coulbeck in tipping coal at the Grimsby Docks. Coulbeck was employed by the Great Central Railway Company to do the tipping, and was paid by them 5*s.* a week certain and sixpence a waggon on all the waggons tipped by his gang, and he divided the total of these sixpences at the end of each week between himself and the members of his gang. The average weekly earnings of the applicant for the statutory period before the accident in respect of which he claims compensation amounted to £1 16*s.* 6*d.* The railway company undertake, as between themselves and the consignors of coal by their line, to have the coal unloaded from their railway trucks and tipped into the

vessels, and a charge for this tipping is included in the amount payable to the company for the carriage of coal. The tipping is done by means of a hoist and apparatus connected therewith on the quay side worked by hydraulic power. This machinery is the property of the company, and it is admitted that the applicant's employment in connection with it was employment in or about a "factory" within the Workmen's Compensation Act, 1897. The company allowed Coulbeck and his gang the use of this machinery for the purpose of unloading coal from the railway trucks and tipping it into the vessels, but the servants of the company kept the machinery in order by oiling it. The applicant, whilst tipping, met with an accident in the course of his employment which crushed his thumb, and totally incapacitated him from work for eleven weeks. His claim to compensation from the respondents was resisted on the ground that Coulbeck was the "occupier" of the machinery, and therefore the "undertaker" at the time of the accident, and that his claim should have been against Coulbeck; and it was contended that the case was concluded by the decision in *Carrington* v. *Bannister* (*sup.*). It was sought on the part of the applicant to distinguish the facts of that case from those of the present case; but no substantial difference between the facts of the two cases was made out to my satisfaction. Does the decision in *Carrington* v. *Bannister* therefore dispose of the present case? In my opinion it does not. In that case, instead of claiming compensation from the railway company, the applicant chose to claim it from the contractors, Bannister & Co., and the only question which, by agreement of the parties, I was called on to decide was whether on the facts proved before me the contractors were at the time of the accident the occupiers of the tipping machinery, and I held that they were, a decision which was affirmed by the Court of Appeal. On such a finding it was not disputed that the contractors were liable. Does it therefore follow that the railway company may not be liable also?

Sec. 4 of the Workmen's Compensation Act, 1897, provides that "where . . . the undertakers . . . contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman . . . by such contractor, or would be so payable if such contractor were an employer to whom the Act applies." This provision appears to me to exactly meet the present case, so far as the unloading and tipping the coal is concerned. The railway company are the original undertakers and owners and occupiers of the tipping machinery. Instead of doing the tipping themselves, they contract with Coulbeck for the execution of the work by him, and allow him the temporary use or occupation of the machinery. One of the men employed by Coulbeck meets with an accident for which he would be entitled to compensation if he were immediately employed by the company. The section provides that the company shall be liable to pay him as if he were immediately employed by them. I must hold, therefore, that his claim to compensation by the company is established. I fix the amount at 18*s.* 3*d.* per week, and I award him costs to be taxed on scale B, and I allow the special additional fee to counsel mentioned in item 86.

Solicitor for the applicant, *John Barker*, Great Grimsby.

Solicitor for the respondents, *D. H. Davies*, Manchester.

Sec. 4 deals only with "undertakers." Undertakers in the case of a factory "means the occupier thereof." That can only mean the present occupier, not "the original undertakers and owners and occupiers."

A difficult question might have arisen out of the facts of this case, viz. whether the employment was not on, in, or about a "wharf or dock of or belonging to (*a*) a railway, and used for the purposes of public traffic."

November 15, 1900.

## MERRILL *v.* WILSON, SONS & COMPANY (LIMITED).

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 490.

*Actual Use or Occupation of a Quay.*—SEC. 7.—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37) *sec.* 23, 1.

Persons using a portion of a quay for the purpose of unloading a ship to the quay have, within the meaning of the Factory and Workshop Act, 1895, sec. 23, 1, "the actual use or occupation" of the quay, and are therefore "undertakers."

THIS was an appeal by the widow of a deceased workman from a decision of the Judge of the Hull County Court that the respondents were not liable to pay her compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who had been killed by an accident arising out of and in the course of his employment by the respondents.

The respondents were the owners of the steamship *Ohio*, which entered the Alexandra Dock, Hull, the property of the Hull and Barnsley Railway and Dock Company, for the purpose of discharging her cargo.

The deceased workman was a dock labourer, and was engaged by the respondent, as one of a gang, to assist in discharging into lighters some cattle that were on board the ship.

There was other cargo in the ship, which some days later was discharged on to the quay.

The County Court Judge found the following facts: As a preliminary to discharging the cattle, and as the steamship came alongside, the deceased man and others got the end of a gangway, lifted from the quayside, on board; and

as soon as they had got it there the men turned round in pursuance of orders to go on board over the gangway.

In turning round the deceased's foot slipped on a piece of iron, and he fell over into the dock. Before anything could be done to prevent it, the ship closed in and crushed him to death.

The gangway in question was not used in the ordinary processes of loading and unloading cargo, but as a means of access from the quay to the ship and from the ship to the quay for the crew, and also for passengers and their light luggage, when there were any. There were none on this voyage.

Upon these findings of fact the learned County Court Judge held that the work on which the deceased was engaged was work on, or in, or about a ship, and that such an employment was not one to which the Workmen's Compensation Act, 1897 applied, so that the applicant was not entitled to compensation under that Act from the respondents.

The applicant appealed.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides as follows:

Sec. 7.—(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on, or in, or about a railway, factory. . . (2) In this Act . . . "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Act, is applied by the Factory and Workshop Act, 1895, . . . "undertakers" in the case of a factory means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895.

The Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), provides as follows:

Sec. 23. The following provisions, namely . . . shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process . . . were included in the word "factory" . . . and for the purpose of the enforcement of those sections the person

having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory.

*W. H. Owen*, for the applicant: The County Court Judge was wrong in holding the deceased's employment to have been on a ship. No such phrase occurs in the Workmen's Compensation Act, 1897, as employment "on a ship." The deceased was working on, or in, or about a dock or quay within sec. 23 of the Factory and Workshop Act, 1895. He was employed by the job, and he may fairly be said to have been engaged in his employment when he was standing on the quay and pushing the gangway on board the ship preparatory to his coming on board and beginning the actual work of discharging the cargo. Working "on a ship" does not necessarily exclude employment on, or in, or about a dock or quay. He referred to *Flowers* v. *Chambers* (80 L. T. R. 834; [1899] 1 W. C. C. 51). Next, the respondents were "occupiers" of the dock or quay on which the deceased was working, within sec. 23 of the Factory and Workshop Act, 1895, and, if so, were "undertakers within sec. 7 of the Workmen's Compensation Act, 1897. The respondents were clearly occupiers of the berth their ship was in. They were in "actual use and occupation" of the berth, and also, I submit, of the space of the dock or quay alongside the ship. No other ship could use that part of the quay while the ship was in that berth. Putting the gangway from the dock side to the ship was a legitimate use of the dock: *Woodham* v. *Atlantic Transport Company (Limited)* ([1899] 1 W. C. C. 52). "Occupation" is used in sec. 23 in a very wide sense, not in the narrow legal sense. It does not mean "occupation" in the sense in which the tenant of land is in occupation. The fact that any person in the docks would probably be allowed to walk about on the quay by the ship's side is not enough to show that the respondents had not the "actual use and occupation" of it. A gangway is "plant" within sec. 23:

*Yarmouth* v. *France* (18 Q. B. Div. 647). On that ground, also, if my first point fails, I contend that the respondents are liable to pay compensation.

*Joseph Walton*, Q.C. (*Burleigh Kilburn* with him), for the respondents: I do not deny that the employment of the deceased was on, or in, or about a dock or quay in the sense that if the respondents had been the owners of the docks they would have been liable in this matter. The real question is whether the respondents were "undertakers" within sec. 7 of the Workmen's Compensation Act, 1897. That depends on the meaning of the words "the person having the actual use and occupation" in sec. 23 of the Factory and Workshop Act, 1895. Those words do not include all persons who in common parlance are said to "use" the place in question. A person in a shop or restaurant is "using" it, but undoubtedly he would not be held to be in "actual use and occupation" of it within sec. 23. What is the sense in which "use" is there used? I submit the word was put in before "occupation" simply to avoid the legal quibbles which, it was thought, would probably arise as to the exact meaning of "occupation." That is to say, the word is used in a sense analogous to "occupation." The Legislature intended to cover the case of a person using a place in the same kind of way as he would use it if he were the "occupier" of it in the strict legal sense. A carter sent with goods to a ship in a dock in one sense "uses" the dock, but he would not be the "occupier" within sec. 23, because his use would not be analogous to occupation. "Actual" use means "whether having a legal title to the land or not." If a company owning a dock were to allow a railway company to appropriate part of the dock for its railway, so that other persons would be excluded from using that part of the dock, then probably the railway company would be the "occupiers" of that part of the dock within sec. 23, although their use of it might be only by the sufferance of the dock company. "Use" must here be read in connection with and forming

one phrase with "occupation." "Using" here does not come to the same thing as "having the use of." In connection with a place, "use" implies "occupation." The sense in which a person has the use of machinery or other implements is different from that in which a dock or a piece of land is used. There is no idea of occupation in the case of a chattel. A ship in a berth has a right of way over the adjoining quay, but is not "using" the quay in the sense of occupying it. The use of a quay for the purposes of unloading cargo is not in any sense an exclusive use or occupation. The sole ground here upon which the respondents are said to have had the "use and occupation" of this quay is that a servant of theirs happened to be standing there and doing some work for them. He cited *Francis* v. *Turner Brothers* ([1900] 2 W. C. C. 61). As to the gangway, it cannot be said to be "plant" within sec. 23, because, as the County Court Judge has expressly found, it was not used in the ordinary processes of loading and unloading cargo to or from the quay. At the very highest a gangway could only be said to be ancillary to the process of loading and unloading, because it was only used to enable persons to go to and from the dock and the ship.

A. L. Smith, M.R.: In this case a claim has been made against the owners of a ship which took up a berth alongside the quay, in the Alexandra Docks at Hull. The ship had a cargo of cattle and other merchandise. The respondents were going to unload the ship as their own stevedores, and for that purpose had engaged the deceased man, whose widow is now seeking for compensation. The deceased was on the quay, and was occupied in pushing a gangway from the quay on to the ship for the purpose of getting on board the ship and unloading the cattle into lighters on the other side of the vessel, when the accident happened which caused his death. His foot slipped, and he fell over the quay, and was crushed between the ship and the wall. The County Court Judge made an award in favour of the respondents, on the ground that the

employment of the deceased was on a ship. In my opinion there was no evidence before him to support that finding. The deceased had not got on to the ship. He was working on the quay when the accident happened. On that point, therefore, I cannot agree with the County Court Judge. The next question is whether, if he was working on the quay, he was working "on, or in, or about a factory" within sec. 7 of the Workmen's Compensation Act, 1897. That section enacts that the word "factory" shall include any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Looking, then, at sec. 23 of the Factory and Workshop Act, 1895, it seems to me perfectly plain that the deceased at the time of the accident which caused his death was working on a "factory" within the meaning of sec. 7 of the Workmen's Compensation Act, 1897. Then comes the question whether the respondents were "undertakers" within sec. 7. The word "undertakers" is there defined as meaning in the case of a factory "the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895." To find the meaning of "occupier" we have to refer to sec. 23 of the Factory and Workshop Act, 1895. The meaning of that section was discussed recently in this Court in the case of *Carrington* v. *Bannister & Co.* (*ante*, p. 146), and I shall not go through it again. The question before us now depends merely on the meaning of the words at the end of the section, "the person having the actual use or occupation of a dock, wharf, quay, or warehouse . . . shall be deemed to be the occupier of a factory." Were the respondents "in actual use or occupation" of this quay at the time of the accident? The quay was built for the purpose of its being used by ships when loading or unloading. The respondents' ship was alongside the quay, and so long as she lay there she was monopolizing the part of it by her side. It is not like the case of a carter coming on to the quay to deliver goods, or of a clerk or other person walking over

the quay on his way to the ship. By bringing their ship alongside, the respondents were actually using and occupying a portion of the quay, and I cannot say but that they were therefore the "occupiers of a factory" within sec. 23 at the time of the accident, and therefore were "undertakers" within sec. 7 of the Workmen's Compensation Act, 1897. Another and an alternative point was also argued on behalf of the applicant. It was contended that the gangway was "plant," used in the process of unloading, within sec. 23 of the Factory and Workshop Act, 1895. But on the facts that argument fails. The facts are that the gangway was not being used or about to be used at the time of the accident for the purpose of unloading from the ship to the quay, but to enable the workmen and other persons to get on to the ship from the quay so that the cattle might be discharged into lighters on the other side of the vessel. Therefore, on this point, I think that the applicant's argument fails. But for the reasons I have given I think that she is entitled to succeed upon the first point, and that the appeal must therefore be allowed.

COLLINS, L.J.: I am of the same opinion. The question is whether the respondents are "undertakers" in respect of a "factory" on which the deceased was employed at the time when he was accidentally killed. It is not disputed by the learned counsel who appeared on behalf of the respondents that the place on, or in, or about which the deceased was employed is one that is capable of being a "factory" within sec. 7 of the Workmen's Compensation Act, 1897. The deceased was employed on, or in, or about a quay, and he also had duties to perform on the respondents' ship. The County Court Judge seems to have thought that one employment excluded the other, but it seems to me quite clear that, whatever may have been the duties of the deceased after getting on board the ship, his employment at the time of the accident was on the quay. Now a quay undoubtedly may be a "factory" within the Workmen's Compensation Act, 1897, because the word includes those

things, including docks, wharves, and quays, which are to be deemed factories according to the provisions of sec. 23 of the Factory and Workshop Act, 1895. Therefore we find that the deceased was employed physically upon something which is capable of being a factory. We have to see whether the respondents were "undertakers" of a "factory." The two things must be taken together, in order to find out whether the particular place where the deceased met with his death was a "factory," and whether the respondents were "undertakers." Now it is to be observed that, though the term "factory" has been made by a somewhat roundabout process to cover a number of different subject-matters, there is one feature common to all of them. They are all of them places which are capable of being defined in area, not necessarily with minute exactness, but sufficiently for all practical purposes. The area of ground on which at any given moment a man is standing is subject merely to a *pedis possessio*. It would be impossible to say that a small, undefinable space like that, only occupied for a moment, could be a "factory" within the meaning of the Act. It seems to me that to constitute such a "factory" you must have some area definable by metes and bounds. In the present matter we are considering the case of a quay which is a space capable of being a "factory," if it is used to such an extent as to make it definable in the way I have mentioned. A person standing on it cannot be said to be the occupier of a factory, but I see no reason why the space of quay along the side of the ship should not be capable of being a factory and of being occupied by some one in that sense. Were the respondents, then, the "undertakers" in respect of that quay at the time of the accident? "Undertakers" is defined in sec. 7 as meaning in the case of a factory its occupier within the Factory and Workshop Acts, 1878 to 1895. The question then arises, under sec. 23 of the Factory and Workshop Act, 1895, whether the respondents were in "actual use or occupation" of the quay. In order to decide whether a

person can be said to have the "actual use or occupation" of anything, it is important to consider the nature of the subject-matter which is said to be in use or occupation. We must look at the purpose for which it exists and for which it is ordinarily used. A quay such as this is made and used, as is well known, for the purpose of loading and unloading ships. Such a user as that does not involve the absolute exclusion of every one not engaged in the service of the ship from the area of quay so used, but it does involve this, that for the length of the ship the quay is used exclusively by that ship so far as the purposes of loading and unloading are concerned. For those purposes the ship has the sole benefit and use of that part of the quay. I cannot see how in any other sense there could be any actual user of the quay. Now, the Act does not insist upon anything more than "actual user." That expression seems to me to mean something less than "occupation," in the strict sense of that word. I think that full meaning is given to "actual use" when it is treated as the user by the owner of a ship who is using the quay for all the purposes incidental to the loading or unloading of the ship. The respondents had practically the exclusive right and enjoyment of a substantial area of the quay for the length of their ship. Therefore I think we have here all the necessary elements to entitle the applicant to succeed. There is a factory, its actual user by the respondents, and the accident causing the death of the deceased while he was employed on, or in, or about the factory. For these reasons I agree that the appeal should be allowed. One other point was argued, and as to that I agree with what my Lord has said. A gangway is capable, I think, of being "plant," but in the present case the gangway was not being used in the process of loading or unloading the ship to or from the quay. The use of the gangway was merely ancillary to the process of unloading, and that is not enough to make the gangway "plant" of the kind mentioned in sec. 23 of the Factory and Workshop Act, 1895. There is

also another difficulty in the applicant's way. The unloading of the ship on which the deceased was employed was not on to the quay, but into lighters, and for this reason also the gangway is not within the meaning of the "plant" mentioned in clause (*a*) of sec. 23.

STIRLING, L.J.: I agree. I think that the respondents had the actual user of the quay alongside their ship, and they were therefore the "occupiers" of the quay within the Act. I agree also on the other point as to the gangway. The evidence shows that it was not used in the process of unloading from the ship on to the quay, because the ship was going to be discharged into lighters. The gangway is therefore not within the meaning of the word "plant" in sec. 23.

Appeal allowed.

Solicitors for the applicant, *Williamson, Hill, & Co.*, for *T. & A. Priestman*, Hull.

Solicitors for the respondents, *Pritchard & Sons*, for *J. & T. W. Hearfield & Lambert*, Hull.

Also reported (1901) 1 Q. B. 35; 70 L. J. Q. B. 97; 83 L. T. R. 490; 49 W. R. 161; 17 T. L. R. 49.

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March 12, 1901.

## FULLICK *v.* EVANS, O'DONNELL & COMPANY.

Before A. L. SMITH, M.R., COLLINS and ROMER, L.JJ.

84 *L. T. R.* 413.

*Engineering Work—Railroad—Construction of Signal-box.*—SEC. 7, 2.

The expression "railroad" in sec. 7 includes a signal-box and everything that is a necessary part of a "railway" as a workable undertaking.

THIS was an appeal by the respondents in the County Court from a decision of the Judge of the Westminster

County Court awarding to the applicant compensation under the Workmen's Compensation Act, 1897.

The applicant was a workman in the employ of the appellants and was injured by an accident arising out of and in the course of his employment.

The appellants were contractors for erecting railway signal-boxes, and were engaged in constructing a signal-box by the side of a new railway which was being made by some other contractors. The applicant was engaged by the appellants to make some holes in the concrete floor of the signal-box when the accident happened for which he claimed compensation.

The County Court Judge held that the applicant's employment was on, or in, or about "engineering work" within the meaning of sec. 7 of the Workmen's Compensation Act, 1897, and awarded him compensation.

The employers appealed.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides as follows:

> Sec. 7.—(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on, or in, or about a railway, factory, mine, quarry, or engineering work. . . . (2) In this Act . . . "engineering work" means any work of construction, or alteration, or repair of a railroad, harbour, dock, canal. . . .

*Ruegg*, K.C. (*McIntyre* with him), for the appellants: The workman was not employed on any work of construction of a "railroad," and the County Court Judge was therefore wrong in holding that the applicant was employed on an "engineering work" and therefore entitled to compensation. In other parts of the Act the word "railway" is used, and that word is defined in sub-sec. 2 as meaning the same thing in this Act as in the Regulation of Railways Act, 1873. But in defining "engineering work" the Legislature has used the word "railroad," not "railway." The presumption is that something different from "railway" is meant by the word "railroad." It must have a

more limited meaning, and, we submit, it here means the permanent way only. The employment of the applicant was not "on, or in, or about a railway" within sub-sec. 1 of sec. 7, because the appellants were not the "undertakers" of the railway.

*W. E. Ball*, for the applicant, was not called upon.

A. L. Smith, M.R.: The County Court Judge made an award here in favour of the applicant, and the sole question we have to consider is whether the applicant's employment, at the time of the accident, was on, or in, or about an "engineering work" within the meaning of this Act. The applicant was employed on the construction of a railway signal-box, and it was while he was making a hole in the floor that the accident happened for which he claims compensation. For the appellants it is contended that the work on which the applicant was employed was not "engineering work" within sec. 7. In sub-sec. 2 of that section "engineering work" is defined as including "any work of construction, alteration, or repair of a railroad." It is admitted that if instead of "railroad" in that sub-section, the Legislature had used the word "railway," the applicant would be entitled to compensation. The only argument addressed to us was that because the Legislature used the word "railroad" in defining an "engineering work," they must have intended something different from that which is included in the definition of the word "railway." I do not agree with that contention. I think "railroad" in this sub-section means the same as "railway." I see no difference between them, and I do not understand what was the reason why the Legislature in this definition of "engineering work" used the word "railroad" in preference to the word "railway." I think the learned County Court Judge was right, and this appeal must be dismissed.

Collins, L.J.: I am of the same opinion. Whether the word in this definition be "railroad" or "railway," I think that it would cover the case of a railway signal-box.

ROMER, L.J.: I agree. The word "railroad" is used here, I think, in its proper sense as including every part of a railroad which is necessary to make it a workable undertaking.

Appeal dismissed.

Solicitor for the applicant, *F. C. James.*

Solicitors for the appellants, *Bell, Brodrick, & Gray.*

Also reported 84 L. T. R. 413; 17 T. L. R. 346.

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November 14, 1900.

## COSGROVE *v.* PARTINGTON.

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

17 *T. L. R.* 39.

*Engineering Work—Any other Work.*—SEC. 7, 2.

The expression "any other work" in the definition of "engineering work" is not limited to work *ejusdem generis* as work on a railroad, harbour, dock, canal, or sewer.

THIS was an appeal from an award of the Judge of the County Court of Lancashire, holden at Oldham. The injured workman was at the time of the accident engaged with other workmen in putting a fifth story on to a mill. The work included the hoisting of iron girders by means of a steam winch. The County Court Judge found that the workman was employed on an "engineering work" within the meaning of the Workmen's Compensation Act, and made an award in his favour. The employer appealed on the ground that the employment was not on an engineering work.

Mr. *Ruegg*, Q.C., and Mr. *G. Mellor* appeared for the employer; Mr. *Herbert Smith* for the workman.

The COURT, without calling upon counsel for the workman, dismissed the appeal.

The MASTER OF THE ROLLS said that the short point was whether the employment of the workman at the time of the accident was employment on "engineering work." Sec. 7 of the Workmen's Compensation Act said, by sub-sec. 1, that the Act was to apply only to employment on, or in, or about a railway, factory, mine, quarry, or engineering work. Then sub-sec. 2 defined "engineering work" as meaning "any work of construction, or alteration, or repair of a railroad, harbour, dock, canal, or sewer," and including "any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The workman here was engaged in putting on a new top story to a mill, which was either construction or alteration, and the work involved the use of a steam winch. Why was not this within the Act? It was argued by Mr. Ruegg that the words "any other work" ought to be limited to work *ejusdem generis* with the works specifically mentioned in the section. But in his Lordship's opinion those words were used for the purpose of enlarging the meaning of engineering work. He did not feel inclined to cut down the meaning of the section, and he thought that the appeal ought to be dismissed.

The LORDS JUSTICES concurred.

Also reported 64 J. P. 788; 17 T. L. R. 39. See *Bennett* v. *Aird* ([1899] 1 W. C. C. 138).

March 13, 1901.

## SIMMONS *v.* FAULDS.

Before A. L. SMITH, M.R., COLLINS and ROMER, L.JJ.

17 *T. L. R.* 352.

*Workman—Independent Contractor.*—SEC. 1; SEC. 7.

A person who contracts to do or get done work at a fixed price to the amount of £160 is not a workman within the meaning of the Act.

THIS was an appeal from an award of the Judge of the Lambeth County Court. The applicant for compensation was George Richard Simmons, a foreman bricklayer, who was injured by an accident while engaged in a building operation for Andrew Faulds, from whom he sought compensation. The evidence of the applicant was to the following effect: That he tendered to Faulds for the job in question, giving an estimate of £160, that he started work acting as foreman, that he was to be paid as the work progressed, that he used to draw about 75 per cent. of the work done, that he was not to supply any material, that his tender was for labour and tools, and that he had been working on the job about eight weeks before the accident. The County Court Judge was of opinion that a man, although he was a sub-contractor, might be a workman within the meaning of the Act, and he made an award in favour of the applicant for a weekly payment of £1. Faulds appealed.

Mr. *Ruegg*, K.C. (Mr. *Addington Willis* with him), appeared for the appellant, and said it was clear from the evidence that the applicant was a sub-contractor, and therefore he was not a workman within the Act.

Mr. *H. B. D. Woodcock* appeared for the applicant, and contended that, though he might not be a workman in the

common sense of the word, he was a workman within the Act, and that the question was one of fact for the County Court Judge.

The COURT allowed the appeal.

The MASTER OF THE ROLLS said that the Act applied to workmen only, and not to contractors, and the evidence was clear that in this case the applicant was a contractor to supply labour.

The LORDS JUSTICES concurred.

Solicitors: *Treadwell*, for the appellant; *Taylor, Willcocks, & Lemon*, for the applicant.

Also reported 65 J. P. 371; 17 T. L. R. 352. This decision is of wide importance. See The Case Law of the Workmen's Compensation Act, 2nd edit., pp. 23, 24, and 9; *Burrell* v. *Avis* ([1899] 1 W. C. C. 129), *Cass* v. *Butler* ([1900] 2 W. C. C. 87), *Cooper* v. *Davenport* ([1900] 2 W. C. C. 44).

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May 16, 1901.

## OWEN *v.* CLARK.

### Before His Honour JUDGE O'CONNOR.

*The Law Times, June* 15, 1901.

*Shipbuilding Yard—Near.*—SEC. 7, 3.

A vessel which is being finished 100 yards away from the quay where the engines and boilers were put into it is not "about" the quay.

*Qu.*, whether it is "near" a "shipbuilding yard." *

AT the Sunderland County Court, on May 16, his Honour heard this case. The applicant, a boilermaker, applied for an award under the Workmen's Compensation Act against Messrs. George Clark (Limited), engine and boiler builders, Southwick. Applicant was employed on board a new steamship, into which boilers were being

* See note at end of the report.

put. The vessel was lying in the river Wear, near the respondents' works, on January 30 last. A holding-up hammer fell on his head and caused injury to his head and resultant injuries, which rendered him at present totally incapable. His incapacity was not expected to be of long duration. The average weekly wage of applicant for the twelve months previous to the injury was £2 6*s*., and he claimed £1 a week, the maximum allowed by the Act. The respondents denied their liability on the ground that the injury was not caused by accident arising out of and in the course of his employment on, or in, or about the premises of the respondents.

*J. G. Marshall* for the applicant; *E. Shortt* (instructed by *I. Isaac*) for respondents.

*Marshall* said the applicant was one of some sixty men who were employed in the boilering of the ship. The engines and boilers had been put into the ship whilst it was lying at Messrs. Clark's quay. Before the work was actually completed, the ship was moved about 100 yards from the quay, or a distance of 50 yards higher up the river. Before the ship was moved a large quantity of material necessary for completing the boilering of the ship was put on board, and while she was lying in the second place men were continually going backward and forward to Clark's factory for things necessary for the work. This went on for five or six days, and on January 30 plaintiff, whilst employed on the vessel completing the work, was struck by a hammer, and received injuries which had prevented him from working since. The only defence which had been set up was that applicant was not, at the time of the accident, employed on, or in, or about the premises of the respondents, and according to the rule what was not denied in the statement of claim was admitted. The question was whether the man was working about the factory of the respondents at the time of the accident. There was no doubt that he was working in and about his regular employment as a servant of the respondents, and

that he was employed in completing the boilering of this ship, which had been commenced in or about the factory of the respondents. It was whilst completing the work that the man was injured, and he was then about the factory. If the accident had happened in the factory, the man would have been entitled to compensation; and if it had happened at the quay, the respondents would have been liable: *Fenn* v. *Miller* ([1900] 2 W. C. C. 55). Collins, L.J., said that a case was obviously within the meaning of the word "about" where the factory involved the use of an area of land outside the physical factory itself. It would apply equally well to water. At the time of the accident the ship was close to the factory. He also cited *Powell* v. *Brown* ([1899] 1 W. C. C. 44), *Lowth* v. *Ibbotson* ([1899] 1 W. C. C. 46), and *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 1 W. C. C. 47).

*Shortt* said that it was quite clear that no portion of Messrs. Pickersgill's yard would come within the area reasonably necessary for the purpose of the business carried on in the factory. Where the area was necessary it was "about." The mere fact that a man was about his master's business did not bring it into the word "about." He cited *Francis* v. *Turner* ([1900] 2 W. C. C. 61).

His Honour said that when the ship was moved it ceased, if it had ever been, to be a part of Messrs. Clark's factory, even though Clark's men continued to be employed there in considerable numbers. The situation to his mind was this: That some of Clark's men being employed on a job undertaken by them upon the property of another and not on Clark's premises, if one of them met with an accident, whatever other grounds of action he might have, in some other form, he could not successfully bring an action under the Workmen's Compensation Act. He did not doubt that the intention of the Act was to include such a case as that, but, however near the line might be, he thought that case fell outside the ground actually covered by the Act as he read it without authority. On the

authorities he thought there could be no doubt about the view that would be taken by the Court of Appeal. Therefore, though with great regret, he must find for the respondents with costs.

The attention of the learned Judge does not appear to have been drawn to the fact that the quay was a "shipbuilding yard," and that sec. 7, 3, applied. See *Barclay* v. *McMillan* (37 S. L. R. 61). The report is inserted because the decision is under appeal, and the Court of Appeal may lay down a rule of guidance as to when a ship is "near" to a shipbuilding yard.

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November 16, 1900.

## HOUGHTON *v.* SUTTON HEATH AND LEA GREEN COLLIERIES COMPANY (LIMITED).

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

*Earnings—Deductions from Wages.*—SCHED. I. 1.

Deductions from wages for things supplied to a workman necessary for the performance of his work, *e.g.* lamp oil supplied to a miner, do not reduce the amount of his earnings.

THIS was an appeal by the respondents in the County Court from the award of the County Court Judge of Liverpool in proceedings for compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who was killed by accident arising out of and in the course of his employment by the appellants on, or in, or about a mine.

The applicant took proceedings under the Act to recover compensation, and a question arose as to the amount of the "earnings" of the deceased in the employment of the appellants.

The deceased's wages were 30*s.* 11*d.* a week, but in accordance with the practice of the mine a sum of sixpence was always deducted from his weekly wages to defray the cost of the oil for a lamp used by the workman at his work, the oil being provided by the employers.

The appellants contended that the deceased's "earnings" were 30*s.* 5*d.* a week, and not 30*s.* 11*d.*, and that compensation ought to be assessed upon the smaller amount.

The County Court Judge held that the sixpence a week for oil for the lamp could not be deducted in ascertaining the "earnings" of the deceased, and that the compensation must be based upon the sum of 30*s.* 11*d.* a week, as being the weekly "earnings" of the deceased.

*Ruegg*, Q.C., and *S. H. Leonard*, for the appellants: The County Court Judge was wrong in holding that the workman's weekly "earnings" were the full nominal amount of his wages. A workman's "earnings must be that which he actually receives from his employer—that which is actually paid to him; his "earnings" cannot be the nominal amount of his wages, which he never in fact receives, by reason of agreed deductions being made. The two expressions "wages" and "earnings" are used in the 1st schedule of the Act, and there must be some difference in their meaning. In all the dictionaries "earnings" are defined as being the actual gain acquired. Like income, "earnings" means the balance of gain over loss. Earnings must be that which a man in fact gets to expend or invest, and cannot include that which he never does in fact get. Therefore the real amount of the workman's "earnings" in the present case was 30*s.* 5*d.* a week, the sum which he actually received from his employers, and not 30*s.* 11*d.* a week, the nominal amount of his wages which he did not in fact receive.

*Montague Lush*, for the applicant: The only question in this Court is whether there was any evidence upon which the County Court Judge could properly find that the weekly "earnings" of the deceased were 30*s.* 11*d.* It must be in each case a question of fact what are the "earnings" of the workman, and that no general principle can be laid down appears quite clearly from the argument of the appellants. Earnings are really the same as wages, and are not to be ascertained by deducting from wages the cost

of what the workman has to spend in order to earn his wages. In a case like the present one, it is only as a matter of convenience that the oil is bought from the employer; the result is just the same as if the workman bought it somewhere else and paid for it in cash. This was an illegal deduction contrary to the provisions of sec. 3 of the Truck Act, 1896 (59 & 60 Vict. c. 44), and for that reason cannot in any case be considered as a deduction from the wages.

*Ruegg*, Q.C., in reply.

A. L. SMITH, M.R.: In this case we cannot say that the County Court Judge was wrong, although there is much to be said on both sides. The point, which is a small one, is this: The deceased workman earned in money 30*s.* 11*d.* a week; that was his wages to which he was entitled. He had to find oil for his lamp, and the case seems to me to be the same as if he had to supply clothes, or food, or similar things in order to be able to earn his wages. His weekly wages were undoubtedly 30*s.* 11*d.*, but out of these weekly wages he had to expend something. I think that the County Court Judge was right in saying that that expense could not be deducted from his wages in ascertaining his earnings. His wages were subject to this deduction, but that did not make his earnings or wages any less. I cannot see how any line could be drawn, if the fact of the master making a workman buy all sorts of necessary things from him and deducting the price from the workman's wages could be taken into account in estimating the earnings of the workman. I think, therefore, that we cannot overrule the decision of the County Court Judge, and that this appeal fails and must be dismissed.

COLLINS, L.J.: I am of the same opinion. I have not succeeded in getting the appellants to state any principle for excluding the cost of the workman's equipment for doing his work and yet for including, as something to be deducted in ascertaining "earnings," the cost of the oil for his lamp. The appellants do not contend that the cost of

food, clothes, and such things ought to be deducted in ascertaining earnings. Upon what principle can we make any distinction as to the cost of oil? I cannot see upon what principle the cost of that can be deducted, but not the cost of the other things. Further, the matter must be looked at from the point of view of the master as well as of the workman, and in that view the master pays the full amount either in money, or in money and the cost of oil. The master pays the whole amount in one way or the other, and I do not see why that should not be taken into consideration. No principle can be laid down for saying that the one deduction should be taken into account any more than the other. I agree, therefore, that this appeal must be dismissed.

STIRLING, L.J.: I also agree. The question arises as to a deduction of sixpence a week made in respect of oil used by the workman in his employment. There was a bargain between the employers and the workman that the workman should receive 30*s.* 11*d.* a week for wages, he providing the necessary oil for the lamp used in his work, in the same way as a workman provides the necessary tools or clothes. There is no evidence in this case that the workman could not, if he chose, buy the oil where he pleased. If he had done so, it could hardly have been contended that the cost ought to be deducted. If for convenience he bought the oil from his employers, I cannot see any more reason for deducting the cost. Therefore I cannot disagree with the decision of the County Court Judge.

Appeal dismissed.

Solicitor for the appellants, *W. Norton Ellen*, for *Edwin Peace*, Liverpool.

Solicitors for the applicant, *Smiles & Litchfield*, for *J. Massey*, St. Helens.

Also reported (1901) 1 Q. B. 93; 70 L. J. Q. B. 61; 83 L. T. R. 472; 17 T. L. R. 54.

Cf. *Pomphrey* v. *Southwark Press* (*post*, p. 194).

November 14, 1900.

# HATHAWAY *v.* ARGUS PRINTING COMPANY (LIMITED).

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 465.

*Continuous Employment—Two Nights a Week Certain, other Times Uncertain—Average Weekly Earnings—Earnings from other Employers.* —SCHED. I. 1.

Earnings from other employers are not to be taken into account in calculating the average weekly earnings.

Regular employment at a fixed wage on two fixed nights in each week is continuous employment for the purpose of determining the number of weeks for which the weekly earnings are to be averaged.

If in addition to such fixed wage, wages are earned from the same employer for irregular and uncertain employment, these wages are not to be taken into account in calculating the average weekly earnings.

THIS was an appeal by the applicant from the award of the Deputy Judge of the City of London Court in proceedings for compensation under the Workmen's Compensation Act, 1897 for personal injury by accident arising out of and in the course of his employment by the respondents; and a cross-appeal by the respondents.

In February, 1900, the applicant was engaged by the respondents to work for them, as a printer's cutter, upon Thursday and Friday in each week. The employment was on the respondents' premises, which were a "factory" within the meaning of the Act.

On March 16, after the applicant had been so employed by the respondents for about a month, his hand was accidentally cut off by a guillotine cutting machine.

The wages earned by the applicant in the above employment were 17*s.* 4*d.* a week.

During this period the applicant was also employed from time to time by the respondents upon casual jobs, for which he earned on an average 14*s.* a week.

During the same period the applicant also worked for other employers, and thereby earned on an average 8*s.* 8*d.* a week.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides:

Sec. 1.—(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act.

First Schedule.—(1) The amount of compensation under this Act shall be—(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

The claim was heard before the Deputy Judge of the City of London Court.

The learned Judge found that the applicant, in respect of the work on Thursday and Friday in each week, was in the continuous employment of the respondents under a continuing contract. He further found that the wages earned by the applicant for casual jobs from the respondents were not earned under a continuous employment.

The learned Judge held that the "average weekly earnings" of the applicant, which could be taken into account in ascertaining the amount of compensation to be paid to the applicant, were the amount which he earned in the employment upon Thursday and Friday in each week; and that the amount which he earned from the respondents for casual jobs and from other employers could not be taken into account.

The award was accordingly made for 50 per cent. of 17*s.* 4*d.* a week, that is, for 8*s.* 8*d.* a week.

The applicant appealed; the respondents gave notice of a cross-appeal.

*R. M. Minton-Senhouse*, for the appellant: The learned Judge was wrong in holding that, in computing the "average weekly earnings" of the applicant, only the earnings from the regular employment by the respondents on two days in each week could be taken into account. The "average weekly earnings" of the applicant included the whole of his earnings, from whatever source, during the period that he was in the employment of the respondents. Even if the earnings of the applicant from employers other than the respondents ought not to be taken into account, it must be clear that all his earnings in the employment of the respondents ought to be taken into account. There is nothing in the provisions of clause 1 (*b*) of the 1st schedule of the Act to cut down the meaning of "average weekly earnings" so as to exclude part of the earnings in the employment of the same employer. The whole of his earnings from the respondents during the whole period of his employment by them ought to be taken into account: *Price* v. *Marsden* ([1899] 1 W. C. C. 108), *Williams* v. *Poulson* ([1900] 2 W. C. C. 126), *Small* v. *McCormick* (1 Ct. Sess. Cas., 5th series, 883). The employment by the respondents was "continuous" as to all the work done for them by the applicant; it was none the less continuous because there might be various successive contracts of employment in respect of each casual job: *Jones* v. *Ocean Coal Company* ([1899] 1 W. C. C. 94), *Keast* v. *Barrow Hæmatite Company* ([1899] 1 W. C. C. 99). If the employment was "continuous," all the earnings in that employment must be taken into account.

*Arthur Powell*, for the respondents: The applicant was not entitled to recover any compensation at all, because this was not an employment within the Act. It has been decided in this Court that, to bring a case within the Act, there must have been "continuous" employment for at least two weeks: *Lysons* v. *Knowles & Sons* ([1900] 2 W. C. C.

101), *Stuart* v. *Nixon* ([1900] 2 W. C. C. 104). Through all the clauses of the 1st schedule employment means "continuous" employment: *Appleby* v. *Horseley Company* ([1899] 1 W. C. C. 103). This was not a case of continuous employment at all, for the applicant was during the same period working for other employers. It was impossible under those circumstances for him to be in the continuous employment of the respondents. The employment must all be by the same employer. There was a break in the employment of the applicant by the respondents in every week when, after working for two days for the respondents the applicant went and worked for other employers. A continuous contract does not necessarily make a continuous employment. If there was any continuous employment within the Act, the Judge has found as a fact that there was continuous employment only in respect of the two days in each week, and that there was not any continuous employment in respect of the casual earnings. Those casual earnings cannot, therefore, be taken into account in computing the "average weekly earnings" of the applicant.

*Minton-Senhouse*, in reply: What has to be taken into consideration is whether there was continuous employment by the respondents, the applicant's employers.

A. L. Smith, M.R.: This is an appeal by the workman, the applicant, against the award of the Deputy Judge of the City of London Court in proceedings for compensation under the Workmen's Compensation Act, 1897. The applicant complains that he has not been awarded sufficient compensation. Compensation has been awarded upon the basis of "average weekly earnings" of 17*s*. 4*d*. a week. The applicant says that is not right, and that further sums of 14*s*. a week and 8*s*. 8*d*. a week ought to be added to the "average weekly earnings," the latter sum being the wages which he earned from other employers. As to this last sum, the applicant's contention is clearly not good; the Judge cannot take into consideration wages which have been earned from other masters. We have already said that

in this Court. Upon the evidence and the facts as found by the Deputy Judge, the applicant had contracted with the respondents for employment upon Thursday and Friday in each week, and had continued in that employment for about four weeks; for that work he was paid 8*s.* 8*d.* a day. The applicant was then injured by accident, and he claimed compensation under the Act. The question is whether he is entitled to compensation, and, if so, upon what basis. The learned Deputy Judge, having found that there was employment under a contract for two days a week, has based the compensation upon the wages earned in the employment of those two days a week—that is, 17*s.* 4*d.* a week. The respondents contend that the applicant is not entitled to any compensation. They contend that the Court of Appeal has decided that, to come within the Act, the workman must have been in the same employment for at least two weeks. That is correct. We so held in *Lysons* v. *Knowles* ([1900] 2 W. C. C. 101) and *Stuart* v. *Nixon* ([1900] 2 W. C. C. 104), and I still think that we rightly so held. We so held for this reason only; there is nothing in the Act which directly so provides, but the Act says that compensation is to be paid in accordance with the 1st schedule to the Act, and the schedule says that compensation is to be based upon "average weekly earnings." If a case does not come within the schedule, it does not come within the Act at all, because a workman cannot get compensation based upon his "average weekly earnings" when there are not at least two weeks for which the average can be taken. We have not, however, ever said that it is necessary that the workman should be employed for every day of the week in order to have average weekly earnings. Suppose a case in which there is a contract to employ a workman for two days a week for four weeks or more and the workman has no other employment, what difficulty is there in ascertaining his "average weekly earnings"? There is no difficulty at all. It is not the same as the case where there has been employment for only one week, and it is quite easy to do

what the learned Deputy Judge has done in the present case. It is contended further, that the Court of Appeal has said that the service must be continuous. It is true that this Court has so held in cases in which there has been a long break in the service, as in *Jones* v. *Ocean Coal Company* ([1899] 1 W. C. C. 94), where there had been a strike lasting for five months. Apply that rule to the present case, where there has been a contract for service for a month. Was not that a continuous employment? In my opinion it was. Where was there any break in the continuity of the employment? I cannot see any. It is quite true that the workman was not serving the respondents upon the other days of the week, but there was no break in the continuity of the contract of service. In a case of this kind I think that there is continuity of service for the work for which the contract of employment was made. In my opinion, therefore, the Judge was right in holding that the applicant was entitled to compensation as to the 17*s.* 4*d.* a week. Then the workman says that he is entitled to have taken into account the wages which he earned for casual service under the same employers. That casual service was this: The applicant, on the other days of the week when he chose to do so, went to the respondents' premises and asked if there was any work for him to do, and, if there was, he took it. The applicant also did exactly the same thing in the case of other employers. Now, was that casual work a continuous service? It seems to me that there was no continuity about those casual jobs which the workman took or not as he liked. Therefore, that casual work was not part of the continuous service in this case. The Deputy Judge has found that it was not, and I think that he was quite right. I should add that, in the case of *Williams* v. *Poulson* ([1900] 2 W. C. C. 126), which has been cited, this point did not arise, because there was no appeal upon that question, and therefore the case is no authority upon the point. I think, therefore, that the appeal and cross-appeal both fail, and must be dismissed.

COLLINS, L.J.: I am of the same opinion upon both points. First, with respect to the employment for two days in each week, the workman was employed under a contract which existed for a month. I have no doubt that the case is within the words of the Act, and is not taken out of the Act by any disability arising from the provisions of the first schedule for the computation of compensation, for the workman has earned wages for at least two weeks from the same employer. The schedule provides that the amount of compensation shall be "a weekly payment . . . not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer." It seems to me that the applicant was, clearly, during that period in the service of the same employer, although only for two days in each week. Then, as to the other point, I have felt some difficulty. The question is whether casual work done by the applicant for the same employer can be brought into account in ascertaining the amount of his "average weekly earnings" in the same employment. Upon analyzing that question, I think that the earnings for this casual work were not weekly earnings in the same employment. It has already been pointed out in this Court that if a workman is in the employment of the same employer at different times he is not entitled *ipso facto* to take all his earnings from that employer into account, but that the earnings must be in the same employment, that is, that the employment must be continuous. If the periods of employment are separated by a long interval, then it is not all the same employment. Therefore the rough test is whether there has been continuous employment when there have been long intervals in the employment. But the result is not the same in the case of short intervals. There must, indeed, be some *nexus* between short periods of employment, and a contract provides that *nexus* by showing that there is a reasonable expectation of

continuing in the same employment. In the absence of a contract a number of short periods of employment ought not to be held to constitute the same employment. In this case the learned Deputy Judge has found that the casual employment was not a connected employment in the way which I have indicated, and therefore the applicant was not in the same employment of the same employer, in respect of the casual employment, for the necessary period of not less than two weeks. I agree, therefore, that the appeal and cross-appeal must be dismissed.

STIRLING, L.J.: In this case the question arises as to the mode in which the amount of compensation should be ascertained. The standard prescribed by para. 1 (*b*) of the 1st schedule to the Act is "a weekly payment . . . not exceeding 50 per cent. of his average weekly earnings." Now, we are bound by the previous decisions of this Court in *Lysons* v. *Knowles* (*ubi sup.*) and *Stuart* v. *Nixon* (*ubi sup.*), and I adhere to what was said by Collins, L.J., in the latter case, where he said: "The latter standard involves the hypothesis that the workman must have been in the employment of the employer for at least two weeks, by which I do not mean that he must have been in that employment for every day of the two weeks, but that he must have been so employed during two weeks that his earnings can be averaged with reference to that period." I agree with that absolutely. That being so, apply that principle to the present case. The present case is one in which the workman was under a contract of employment to serve the respondents for two days in each week for a month. What difficulty can there be in ascertaining his average weekly earnings for that time? There was an employment for more than two weeks, and I see no difficulty in ascertaining his average weekly earnings during that period. The workman is, therefore, not excluded from the right to compensation which is to be ascertained by reference to "average weekly earnings." Then there

is another question, as to which I feel great difficulty: whether the workman's earnings from the same employer, but on other days of the week, are to be taken into account. It is necessary according to the provisions of the Act that the earnings should be in the employment of the same employer, and we cannot take into account any earnings from another employer. Here there were further earnings from the same employer, and I confess that I feel great difficulty in seeing why they should not be included in ascertaining the amount of his average weekly earnings in the employment of the respondents. I am not, however, prepared to differ upon this point, and I agree that the appeal and the cross-appeal must be dismissed.

Appeal dismissed; cross-appeal dismissed.

Solicitors for the applicant, *Griffith & Gardiner.*

Solicitors for the respondents, *W. Hurd & Son.*

Also reported (1901), 1 Q. B. 96; 70 L. J. Q. B. 12; 83 L. T. R. 465; 49 W. R. 113; 64 J. P. 804; 17 L. T. R. 42.

This case was decided before *Lysons* v. *Andrew Knowles & Sons* came before the House of Lords (*ante*, p. 1).

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March 29, 1901.

## PEERS *v.* ASTLEY AND TYLDESLEY COLLIERIES COMPANY (LIMITED).

Before His Honour JUDGE BOWEN ROWLANDS, K.C.

*The Law Times, April* 13, 1901.

*Average Weekly Earnings—Employment for less than One Week.*—SCHED. I. 1.

Where a workman has worked for less than one week he is only entitled to a moiety of what he has actually earned.

AT Leigh County Court, on March 29, his Honour Judge Bowen Rowlands, K.C., gave his decision in this case.

*T. R. Dootson*, solicitor, for the applicant.

*F. E. Smith* (instructed by *Peace & Ellis*, Wigan) for the respondents.

*Dootson* said the applicant was a collier, living at 70, Leigh Road, Boothstown, and prior to June 14 worked at the Mosley Common Collieries. On Thursday, June 14, he commenced work as a collier at the Kermishaw Nook Pit of the Astley and Tyldesley Colliery Company, and earned 6*s*. the first day. He worked there on the following day, and also earned 6*s*. On Saturday he went to his working place and found that the roof had fallen in, so one of the officials told him to come on the Monday night, and he would find him a job as a day-wage man at 5*s*. 6*d*. a day. Applicant commenced work with the night shift on Sunday night, and worked until five o'clock on Monday morning, when some dirt fell and injured his ankle so much that he did not begin working again until October 10. Compensation was claimed from the first fortnight after the accident, or from July 2 until October 10. Taking the total first two days' earnings at 12*s*., and reckoning for four working days at a detaller's wage of 5*s*. 6*d*. a day, or 22*s*. altogether, the applicant would have earned in a week 34*s*., and therefore he (Dootson) contended that as the Act allowed him to receive 50 per cent. of his "average weekly earnings," applicant was therefore entitled to 17*s*. a week compensation, and that was the amount of compensation now applied for.

*Smith* contended, as the man worked only three days, and earned in that time 17*s*. 6*d*., that that represented his actual weekly earnings, and therefore he was entitled to receive only 8*s*. 9*d*. per week. His point was that when a man had been employed for a number of days less than a week, under no circumstances could there be a "weekly average."

His Honour: In this case the applicant is a collier, and worked for the respondent company, and he went to work, as I understand, on June 14, which was a Thursday, and

worked that day and the next day, and then, in consequence of the road having fallen in, he was not able to continue his work. He was told to come again on the 17th, which was on the Sunday night. It was agreed on all hands that the week at this particular colliery begins on Wednesday and ends on Tuesday, so that in this case his whole work should have been within the week—the artificial week which exists for certain purposes at this colliery. The word "week" has several meanings. It has a meaning from Sunday to Saturday night. For instance, you say when you go to so-and-so, you go at the beginning of the week—that means Sunday, Monday, or, at the latest, on Tuesday. So, on the other hand, when asked how long you have been at a place you say "a week," you mean seven days. These are two meanings, and there is a third, an artificial week, which is adopted in certain collieries for payment of wages for work done brought up to a particular day. In this case, whichever view you take of the week, whether you have it for six days or whether you have it for the artificial week in which wages are paid at this particular colliery, then it comes within both, because he begins work on Thursday and ends on Saturday (Sunday). The question was also asked of the under-manager of the colliery, not on oath, but by Mr. Dootson just when the case was finished, and it appeared from his answer that the work was done in their pits daily, by daily contract, and that a week's notice was not required. Now, under these circumstances, two contentions are before me. One is that he (Peers) earned as a fact 17*s.* 6*d.* within the artificial week, and within—if I may so say—the natural week of six days. It is contended by Mr. Dootson, who has pressed this point with much ability and much earnestness, that what I have to do in assessing the compensation here—the right basis—is, first, to say, if applicant earned 17*s.* 6*d.* in three days, he would earn double that quantity in six days (that is to say, 35*s.*), and then he says I must give him a sum

not exceeding half that during the time of his incapacity. The contention of the other side is, of course, in negation of that advanced by Mr. Dootson, and I think they have said that the estimate of the damage—I mean compensation—is a sum of 2*s.* 9*d.* per week. That is evidently wrong from any point of view, and that was based upon a misconception, as was admitted, of something in connection with the location of the pits where these men had worked, which was very properly abandoned by them at the trial, and therefore we are not in any difficulty as to that. I do not think that I ought to yield to the arguments of Mr. Dootson, and that I ought to discard the actual earnings of the applicant within the week in favour of a hypothetical sum which, if he continued to work for six days, he might have earned; and that is made much stronger in this case than it might otherwise have been from the fact that his payments were irregular. He received 6*s.* per day for the first two days, and 5*s.* 6*d.* for the third, and Mr. Dootson is in this difficulty. Which am I to assume? Am I to assume, contrary to the fact, that he would get 6*s.* per day for the whole of the six days, or am I to assume he would get 5*s.* 6*d.* per day? Am I to assume he would get a greater or lesser amount, because all these things are left in doubt, for there was a fluctuation, and I have no means of informing my mind there might not have been a larger fluctuation and his wages larger or smaller? I only mention that as a difficulty in the way of giving effect to Mr. Dootson's hypothetical proposition that I ought to assume he could earn a certain sum in six days. I have no reason to suppose either that he would have had work or that he would have worked. Supposing he had refused to work for six days—and is not that a possible hypothesis?—am I to give him wages calculated on the supposition that he would have worked six days? Now, it seems to me that Lord Shand's judgment in the case of *Lysons* v. *Knowles* (*ante*, p. 1) has an important bearing on this matter. No doubt the case is as familiar

to counsel as it is to me. Lord Shand says: "In the next place, it appears to me that you read the provisions quite fairly when you propose to get at 'the average weekly earnings' by taking that which the man has made in the week in that particular employment, which is only the wages for a particular day." Having regard to all the circumstances in this case, I think I am doing what is not only just but what is strictly in accordance with that decision by finding as a fact that the man earned 17*s.* 6*d.* in that week, and that the amount of compensation to him is 8*s.* 9*d.* And there is also to be remembered—I think it is this—that this construction by the House of Lords is a construction in favour of the beneficiary under the Act, and I do not feel myself at liberty to enlarge that construction on some hypothetical basis which might, or might not, be realized if the work had been done. I therefore award during the period of incapacity, whatever the time may be, 8*s.* 9*d.*, with costs on C scale.

Cf. *Greaves* v. *Mulliners* (*infra*). As to the meaning of "week," see *Cadzow Coal Co.* v. *Gaffney* ([1900] 38 S. L. R. 40, Ct. Sess.).

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May 21, 1901.

## GREAVES *v.* MULLINERS.

Before His Honour JUDGE WHITEHORNE, K.C.

*The Law Times, June* 22, 1901.

*Average Weekly Earnings—Employment for less than a Week.*—SCHED. I. 1 (*b*).

Where a workman has worked for less than one week he is entitled to a moiety of what he would have earned if he had continued to work for the whole week.

AT the Birmingham County Court, on May 21, his Honour gave his decision in this case.

*McCardie* (instructed by *T. Haynes Duffell*) appeared for the applicant; *Arthur Smith* for the respondents.

The applicant was working a saw, and got his left hand accidentally caught. The thumb was cut off, and three fingers badly injured. He had been set on to work three days before at 7½*d.* an hour, and, as the full week's work was fifty-four hours, it was contended that for the purposes of the arbitration his wages must be taken at 33*s.* 9*d.*, and not the actual 17*s.* 6*d.* which he had earned in the three days.

*Smith* contended that it was not proper to take the full amount which applicant could have earned as his average wages. He pointed out that it was a notorious fact that men did not work the full time. Some of them absolutely declined to work on Mondays. The full rate would therefore be higher than the average.

His Honour: I will give my reasons very shortly for my decision in this case. The question is one which has caused a considerable amount of trouble to various courts, and it is, shortly speaking, this: I have got to ascertain, for the purpose of administering the relief under the Act, what the workman's average earnings were. This workman was at work for, I think, three days when the accident happened—only a portion of a week. How can I ascertain what his average weekly earnings were under such circumstances? I look—naturally it is my duty to look—to the guidance given me by the Supreme Court in this kingdom, the House of Lords, in *Lysons* v. *Knowles* (*ante*, p. 1), and I will take for my purpose the concluding paragraph of Lord Macnaghten's judgment: "In the next place, it is quite clear," he says, "that the word 'average,' which has given rise to all this difficulty, is not used accurately." Now, after the noble Lord has said that, I can say it. "If the rule which the Court of Appeal has laid down were applied strictly, it seems to me that a workman who had served for a year at an unvarying rate of wages and had earned his wages week by week would not be entitled to compensation

at all. You may add up his wages for a year and divide by fifty-two, but you would not get an average, because there would be no variations between which you would take the mean. Lastly, the word 'average,' as was pointed out by Mr. Walton, and more fully by Mr. Scott, occurs in the 2nd sub-section, and it is, I think, plainly not used there in the sense attributed to it in the Court of Appeal. If this case happened—if a claim to compensation was made by a person partially incapacitated, and if at the time of the claim he had returned to work and was earning just half what he was earning before, but had only been at work for one week, you could not take those earnings into consideration and make a set-off against the compensation claim, and that would plainly be unfair and unreasonable. All this seems to show that the word 'average' is used very loosely in the schedule." This is a criticism. Now he gives me absolute guidance. "The obvious meaning, I think, is that you are to take a week's earnings as the unit of calculation; but if there has been a series of weekly earnings of different amounts, you are to take an average, and *the unit will then be, not an actual week's earnings, but a hypothetical week's earnings. You are to take one week with another, as Lord Robertson observed.*" I think the meaning is plain enough. In my judgment, what I have got to look at is this: Have I any evidence before me from which I can fairly infer what the man's earnings—weekly earnings—as a *rate*, not as an actual fact, but as a *rate of earning*, would be? Here I am spared any criticism on the evidence, because it has been honestly and candidly admitted that if the man had continued to the end of the week for which he had engaged himself he would have earned the sum mentioned in his claim, which is £1 13*s.* 9*d.* Now, can I say—with the principle laid down for my guidance in the House of Lords—that I am unable to determine or infer what the man's weekly earnings were? Certainly not. I can say "weekly earnings" are as a rate and not as a fact. His weekly earnings, as a *fact*, are the three days' earnings,

but as a *rate* they are the sum he would have earned if he had continued to the end of the week. That, it appears to me, is the right basis upon which I am to give my relief, and I do so accordingly. The award will be for 16*s.* 10*d.* from the fortnight after the accident.

This case is under appeal.

*Lysons* v. *Knowles* is not an authority in support of the above decision. There, the claim was for half of what the workman had actually earned, and that amount was awarded to him. See *Peers* v. *Astley and Tyldesley Collieries Company* (*Limited*) (*ante*, p. 185).

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May 6, 1901.

## WARD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Before His Honour JUDGE HOWLAND ROBERTS.

*The Law Times, June* 29, 1901.

*Incapacity—Acceleration by Accident—Period of Payments—Award.*—SCHED. I. 1 (*b*).

Where it is proved that, apart from accident, a disease would have caused incapacity for work on a given day in the future, and that an accident has accelerated the progress of the disease so as to cause present incapacity, the award should limit the time during which compensation is to be paid to the period during which incapacity is caused by the acceleration of the progress of the disease.

THIS case was heard at the Wolverhampton County Court, on May 6.

The applicant, Ward, met with an accident by which he injured his knee. He also alleged that the shock of the accident had produced the disease of the eye known as "glaucoma." The nature of the accident was that while engaged in his work on a wharf a loose sheet rope from a passing railway truck twisted round his knee, precipitating him into the canal adjoining the wharf. Besides the knee injury, it was alleged on his behalf that the immersion in

the muddy water of the canal and the consequent sudden shock produced glaucoma.

For the respondents it was contended that they paid the applicant under the Act as regards the injury to the knee caused by the accident, and that the shock of the accident did not produce glaucoma, but that such disease existed prior to the accident, and that, assuming glaucoma to have existed before the date of the accident, the accident did not accelerate the progress of the disease; and further, that, assuming that the shock of the accident had accelerated the progress of the disease, the Judge had power to make a terminable award and to limit the weekly payment to the period of incapacity attributable to the acceleration of the disease, because the award should be only "during incapacity," and, if he found that the incapacity attributable to the accident would endure only for a certain period, it was open to him to make his award for that period only.

On behalf of the applicant it was urged that if the Judge found the progress of the disease to have been accelerated by the accident, he should make his award in the ordinary course, and leave it to the respondents to apply for a revision of the award at a later date under sched. I, para. 12, if and when they were advised.

His Honour held that, although the accident did not produce the glaucoma, yet the disease had been accelerated by the accident, and had thus produced incapacity from blindness which would not in the ordinary course have ensued for a period of two years. He therefore ordered the respondents to make the weekly payment during the period of incapacity attributable to the accident—viz. during the two years—such weekly payment to cease after the expiration of two years; holding that, upon the facts found by him, he had power to make a terminable award, inasmuch as all the evidence obtainable was already before him.

It is submitted that this decision should not be followed. Apart from the difficulty of proving the fact (even if such a fact could with accuracy be found by any one but "a jury"), the Act gives no such power to the arbitrator.

November 16, 1900.

## POMPHREY *v.* SOUTHWARK PRESS.

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 468.

*Compensation—Amount—Earnings.*—SCHED. I. 2.

The maximum compensation recoverable is the difference between what the workman earned before the accident and what he is able to earn afterwards.

It may be that, in addition to the amount of earnings paid in cash, there are other valuable considerations that must be taken into account, but vague matters, such as the tuition of an apprentice, cannot be appraised.

THIS was an appeal by the respondents in the County Court from an order of the County Court Judge at Southwark in proceedings for compensation under the Workmen's Compensation Act, 1897.

The applicant had been injured by accident arising out of and in the course of his employment by the appellants in an employment to which the Workmen's Compensation Act, 1897, applied.

The accident occurred on February 6, 1900.

On May 15 an award was made, upon the application of the applicant for compensation under the Act, in pursuance of an agreement between the parties, for the payment of 3*s.* 6*d.* a week to the applicant.

The applicant was an apprentice, and at the time of the accident his wages were 10*s.* 6*d.* a week. His average weekly earnings during the preceding twelve months were 7*s.* a week, and the award of 3*s.* 6*d.* a week was fixed as being 50 per cent. of his average weekly earnings of 7*s.*

The applicant's hand was so much injured that it would be useless for him to continue as an apprentice,

as he could not become a skilled mechanic, and his indentures were cancelled.

The applicant was subsequently employed by the appellants, at wages of 11*s.* 2*d.* a week, as a labourer.

The appellants then applied, under clause 12 of the 1st schedule to the Act, that the weekly payment should be ended.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides:

First Schedule.—(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident; and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity. (12) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

Upon the hearing of this application it was proved before the County Court Judge that the applicant was eighteen years of age, that 18*s.* a week was the usual rate of wages for a labourer, that in the last year of his apprenticeship the applicant's wages would have risen to 14*s.* a week, with further allowances of about 3*s.* a week for overtime, and that at the end of his apprenticeship he could have earned 38*s.* a week as a skilled mechanic.

The appellants based their application upon the ground that the applicant was then earning as much as he was earning before the accident.

The County Court Judge dismissed the application upon the ground that the workman was earning at least 3*s.* 6*d.* a week less than if he had not been injured.

The appellants appealed.

*G. Spencer Bower* for the appellants: The appellants were clearly entitled to have this award reviewed and to have the weekly payment either ended or reduced. The

County Court Judge misapplied or ignored the decision of this Court in *Irons* v. *Davis & Timmins* ([1899] 1 W. C. C. 26). In that case this very point was argued, and the Court held that the sole test by which the amount of compensation is to be measured is the wage-earning capacity of the workman after the accident as compared with his earnings before the accident, and that, if a workman earns the same wages after the accident as before, he is not entitled to a weekly payment as compensation. In *Chandler* v. *Smith* ([1899] 1 W. C. C. 19) the same rule was laid down. Upon the authority of those cases the County Court Judge, when it was proved that the applicant was earning more than he was earning before the accident, ought to have terminated the weekly payment, making proper provision to enable the applicant to apply in future in case he became able to earn less than before the accident, as was done in the two cases already cited.

*Ruegg*, Q.C., and *H. Newson*, for the respondent: The cases which are relied on by the appellants are no authority upon the question raised in this case, for in those cases there was no evidence or even suggestion that the applicant, but for the injury, could have earned more after the accident than he was in fact earning. "Earnings" does not necessarily mean the same as "wages;" both words are used in the 1st schedule, and must have different meanings. "Earnings" may include more than money wages. Here the applicant, in addition to his wages in money, was receiving instruction in his trade which would enable him to become a skilled mechanic, and thereby earn very high wages. The County Court Judge was entitled to take that into consideration in estimating the "earnings" of the applicant before the accident. [COLLINS, L.J., referred to *Noel* v. *Redruth Foundry Company* (74 L. T. R. 196; [1896] 1 Q. B. 453)]. The award of 3*s*. 6*d*. a week was made by agreement. That award must be taken to have been correct. Subsequently the County

Court Judge has refused to review that award under clause 12 of the 1st schedule, and his discretion in that matter cannot be interfered with.

*G. Spencer Bower* was not heard in reply.

A. L. SMITH, M.R.: This is an appeal by the appellants from an order of the County Court Judge of Southwark dismissing their application for the review of an award. In this case the applicant, who was apprenticed to the appellants, was severely injured in his hand while working in an employment within the Act. Proceedings were taken for compensation under the Act, and by agreement an award was made that the appellants should pay 3*s.* 6*d.* a week to the applicant. At the time of the accident the applicant was earning 10*s.* 6*d.* a week as an apprentice who was learning to become a skilled mechanic in the printing trade; all that he got as earnings was 10*s.* 6*d.* a week. After the accident the applicant's indentures were cancelled, and he went back into the service of the appellants as a labourer, and earned 11*s.* 2*d.* a week. Therefore there can be no doubt that he was earning more money then than he was earning before the accident. Thereupon the appellants applied, under rule 12 of the 1st schedule to the Act, to the County Court Judge to review the award, and the learned Judge dismissed the application upon the ground that the applicant was earning at least 3*s.* 6*d.* a week less than if he had not been injured. That is undoubtedly true. The applicant was, however, in fact earning 11*s.* 2*d.* a week instead of 10*s.* 6*d.* a week, which was the amount of his earnings at the time of the accident. The County Court Judge, in spite of that fact, refused to accede to the application of the appellants. Upon what ground did the County Court Judge proceed? If he proceeded upon the ground that the applicant would, but for the accident, be earning more wages, then I am clearly of opinion that he was not deciding rightly upon the Act. If the Judge proceeded upon the ground that the applicant was at the time of the accident receiving instruction as

well as wages, that, in my opinion, was not a ground upon which he could properly act. In my opinion, the true construction of the Act is that a comparison must be made between the earnings of the workman before and his earnings after the accident. I am not prepared to say what "earnings" means precisely; it may be that where a man gets a cottage rent free, and in similar cases, the value of what he so receives may be taken into account in estimating his "earnings." That, however, is not this case. In this case there is no evidence that the applicant was earning more than 10*s.* 6*d.* a week in any way at the time of the accident. The Workmen's Compensation Act must be construed fairly as between employer and workman. In some cases it has been construed in favour of the workman, and in some cases in favour of the employer. The Act imposes a very large liability upon the employer to pay compensation to the workman who has been injured. What is the limit to that liability to pay compensation for injury which results in total or partial incapacity? Rule 1 of the 1st schedule to the Act provides that "the amount of compensation under this Act shall be . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity . . . not exceeding 50 per cent. of his average weekly earnings." That means that the master will have to pay, as the highest amount of compensation, one-half of his weekly wages to a workman who is injured in his employment. There is no provision of any kind for paying compensation for any other damage which the workman may have sustained. Then rule 2 provides that "in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." That is the rule prescribed by the Legislature to show how to arrive at the amount of compensation: it is to be a weekly payment not exceeding one-half of the man's average weekly

earnings, and the amount of that weekly payment is to be fixed by reference to the difference between the man's average weekly earnings before the accident and the average amount which he is capable of earning after the accident. That is in substance what I said in the case of *Irons* v. *Davis & Timmins* ([1899] 1 W. C. C. 26), and I adhere to what I said in that case. I there said: "He has also awarded him a sum of 2*s.* 6*d.* a week for life, in respect of partial incapacity for work; but I think there is no evidence to justify the award of that or any other sum as a weekly payment under clause 1 (*b*) of the 1st schedule. The evidence shows that, although the respondent lost the top of his thumb, he actually earned the same wages after as before the accident, and, as compensation under the Act is given in respect of loss of wages and not in respect of personal suffering, I cannot see, having regard to the provisions of clause 2 of the 1st schedule, how the respondent can be entitled to a weekly payment after his absence through incapacity to work has come to an end; there is no difference between his average weekly earnings before the accident and the average amount which he is able to earn afterwards that can possibly be taken into consideration." I think, therefore, that upon this ground the employers are entitled to succeed in their application, and that the County Court Judge was wrong. We think that the order which ought to be made is that which was made in *Irons* v. *Davis & Timmins* (*ubi sup.*), for a payment of one penny a week, so that, if the applicant hereafter comes to earn less than he did before the accident, he may be able to apply for an increase of the weekly payment. I think, therefore, that the appellants are entitled to have the weekly payment reduced to one penny a week until the applicant can show that he is not capable of earning as much as before the accident. This appeal must therefore be allowed.

COLLINS, L.J: I am of the same opinion. I think that the

appellants are right in saying that this case, upon the point upon which it was decided by the County Court Judge, is decided by the case of *Irons* v. *Davis & Timmins* (*ubi sup.*). I think that the result of that case, when it is fairly applied, is that the maximum amount of compensation to which a workman can be entitled is the difference between his average weekly earnings before the accident and what he can earn afterwards, and that the fund out of which that compensation is payable is one-half of the average weekly earnings before the accident. I think that that is the fair result of the decision in that case, and that it is not desirable to put any subtle distinction upon it. In that case it was held that, because the workman was earning as much after as before the accident, he was not entitled to a weekly payment as compensation. In this case the workman is given the difference between what he is actually earning after the accident and what he might have earned but for the accident. I think that the case of *Irons* v. *Davis & Timmins* (*ubi sup.*) is an authority which is directly contrary to allowing such compensation. It must be remembered that this is a very special Act which gives less than full damages to a workman who is injured—that is, which gives strictly limited compensation—and that all rights to compensation existing independently of this Act still remain. This Act does not purport to give a full and complete remedy for all injuries sustained by workmen. It is, therefore, no argument to say in any particular case that the workman will not be fully compensated for all the injury which he has sustained. Another point has been argued on behalf of the applicant. It is said that he was an apprentice who was really earning more than the sum of 10*s.* 6*d.*, stated to be his wages, because of the incidental advantages accruing to an apprentice in addition to his money wages. There was, however, no evidence of that before the County Court Judge, and this point was not taken. It may or may not be that all or some of the matters suggested by the applicant's counsel might be taken into consideration

as "earnings," but the point does not arise in the present case, and it is not necessary to decide it. I agree that the appeal must be allowed.

STIRLING, L.J.: I agree that this appeal ought to be allowed. This Act is an entire novelty, and we ought to be cautious in departing from its exact terms. The important part of the Act in the present case is clause 2 of the 1st schedule, which provides that "in fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." Now, I read that clause as meaning that those are the sole elements to be taken into consideration in estimating the amount of the weekly payment. Nothing else is to be taken into consideration. Therefore we have, on the one hand, the average weekly earnings before the accident, and, on the other hand, the average amount which the workman is able to earn after the accident. Then, what are "average weekly earnings" before the accident? They include all cash payments, and possibly may include other matters fairly capable of being estimated in money, such as a house, clothes, &c. The suggestion here is that in addition to money the applicant was earning tuition in his trade. Speaking for myself, I should be of the same opinion as Wills and Wright, JJ., in *Noel* v. *Redruth Foundry Company* (74 L. T. R. 196; [1896] 1 Q. B. 453), that this tuition is not a matter which is fairly capable of estimation in money value. In this case, however, we have no evidence of anything beyond money earnings. As to the amount of that and the amount of the earnings after the accident, there is no dispute here. I think, further, that this case is within the *ratio decidendi* of *Irons* v. *Davis & Timmins* (*ubi sup.*). I think, therefore, that the County Court Judge was wrong, and that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *William Hurd & Son.*
Solicitors for the respondent, *Gibson, Usher, & Co.*

Also reported (1901) 1 Q. B. 86; 70 L. J. Q. B. 48; 83 L. T. R. 468; 65 J. P. 148; 17 T. L. R. 53.

See *Houghton* v. *Sutton Heath and Lea Green Collieries Company (Limited)* (*ante*, p. 173).

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March 13, 1901.

## LEECH *v.* LIFE AND HEALTH INSURANCE ASSOCIATION (LIMITED).

Before A. L. SMITH, M.R., COLLINS and ROMER, L.JJ.

84 *L. T. R.* 414.

*Appeal to Court of Appeal.*—SCHED. II. 4; SEC. 1, 3.

No appeal lies to the Court of Appeal from a decision subsequent to or outside of the award.

THIS was an appeal by a workman from a refusal by the Judge of the Dudley County Court to make any order upon an application by the workman under sec. 5 of the Workmen's Compensation Act, 1897.

In August, 1900, Leech, who was a workman in the service of Messrs. Whittaker & Company, obtained against them an award of compensation under the Act, by which they were directed to pay him a certain weekly sum.

The employers paid him weekly the sum awarded until in the following September they were adjudicated bankrupt.

Thereupon the workman made an application to the County Court Judge, under sec. 5 of the Act, for an order that the Life and Health Insurance Association, with whom his employers had been insured against liabilities under the Act, should pay into the Post Office Savings

Bank the sum for which they were liable under their insurance.

The County Court Judge refused to make any order.

The workman appealed.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides as follows:

Sched. 2. The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration . . . (4) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the County Court Judge, and the decision of the Judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal.

*J. R. Atkin,* for the insurance company, raised a preliminary objection. No appeal lies to the Court of Appeal from the decision of the County Court Judge in this matter. The only cases in which this Court has jurisdiction to hear appeals direct from the County Court are questions of law arising in awards under this Act. He referred to para. 4 of sched. 2 of the Workmen's Compensation Act, 1897, rr. 51 to 58 of the Workmen's Compensation Rules, and to Order XXVI.A of the County Court Rules, 1889.

*H. Tindal Atkinson,* for the workman: This is a question arising in proceedings under the Workmen's Compensation Act, 1897, within sec. 1, sub-sec. 3, and the County Court Judge therefore decided it as an arbitrator.

A. L. Smith, M.R.: This is an appeal from a decision of a County Court Judge, and a preliminary objection has been raised that the appellant has no right of appeal to this Court. I feel no doubt that no such right of appeal exists in this case unless it can be found to have been given by sched. 2 of the Workmen's Compensation Act, 1897. Now, the question in dispute is not one between employer and workman, such as is by that Act to be settled by arbitration.

The question in dispute arose after the award had been made in the arbitration between the workman and his employer. The employer subsequently to the award became bankrupt. He had been insured with the Life and Health Insurance Association, and the workman, in consequence of the employer's bankruptcy, made an application to the County Court Judge under sec. 5 of the Workmen's Compensation Act, 1897, for an order directing the insurance company to pay into the Post Office Savings Bank the money which might be due from them under the policy. Sec. 5 does not say that such an application is to be decided by arbitration. The matter is rather in the nature of an execution. The County Court Judge refused the workman's application. On the appeal by the workman to this Court the insurance company has raised this preliminary objection that the appeal has been wrongly brought here. It is said that the dispute is not one which under the Workmen's Compensation Act is to be settled by arbitration. The only cases in which an appeal comes direct from the County Court to this Court under the Workmen's Compensation Act, 1897, are those which come within the provisions of sched. 2 of that Act. It is clear from the opening words and para. 4 of that schedule that no appeal lies to this Court in the matter now before us, and I think therefore that the appeal must be dismissed.

COLLINS, L.J.: I am of the same opinion. The Court of Appeal has no general jurisdiction over County Courts. It is only in certain specified cases that an appeal is given by the Workmen's Compensation Act, 1897, from a County Court direct to this court. Here the amount of compensation payable under this Act has been determined by arbitration as the Act directs. From that determination under certain circumstances an appeal might have been brought to this Court under para. 4 of sched. 2. But the matter now brought before us is an application ancillary to the recovery of the amount of compensation already ascertained by arbitration. It seems to me that

the machinery of the general rules relating to County Courts must be applicable to this matter, but at all events no right of appeal to this Court in such cases as the present has been granted by Statute.

ROMER, L.J.: I agree.

Appeal dismissed.

Solicitors for the workman, *Robbins, Billing, & Co.*, for *W. Waldron*, Brierley Hill.

Solicitors for the insurance company, *Downer & Johnson*, for *T. H. Duffell*, Birmingham.

Also reported (1901) 1 Q. B. 707; 70 L. J. K. B. 544; 84 L. T. R. 414; 49 W. R. 482; 17 L. T. R. 354.

The point in this case was decided in *Bailey* v. *Plant* (*post*, pp. 209, 215, note).

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May 20 and 23, 1901.

## HARWOOD *v.* ABRAHAMS.

Before COLLINS and STIRLING, L.JJ.

*Security for Costs—Court of Appeal.*—SCHED. II. 4.

Security for costs of an appeal to the Court of Appeal may be ordered.

THIS was an application for security for costs of appeal.

A young man, aged twenty-one, had been killed in an accident, and his father, the plaintiff, applied for compensation under the Act from the employer on the ground that he was a "dependant" within the meaning of the Act, as being in part dependent upon the son's earnings at the time of his death.

The Judge held that the applicant was not a dependant; and the applicant appealed from this decision, on the ground that evidence was given at the hearing upon which

the Judge should have found that the applicant was a dependant.

*Minton-Senhouse*, for the respondent, applied for security for costs, on the ground of the appellant's want of means.

*J. S. Green*, for the appellant: This case is analogous to an application for a new trial, and no security for costs should be ordered. It is impossible to apply for a new trial in a case under the Workmen's Compensation Act, 1897, as the County Court Judge sits as an arbitrator only: *Mountain* v. *Parr* ([1899] 1 W. C. C. 110). But if this appeal is successful it will practically result in a new trial. It is not the practice of the Court to order security for costs on application for new trials: *Hicksher* v. *Crosley* ([1891] 1 Q. B. 224) and *Rickaby* v. *Rickaby* ([1901] P. 134.) Security should therefore not be ordered in this case.

*Minton-Senhouse*, in reply: The question of "dependency" is entirely a question of fact in each case: *Main Colliery Company* v. *Davis* ([1900] 2 W. C. C. 108). Security for costs has been ordered in similar cases, and the point now taken has never been raised before.

COLLINS, L.J.: The point is one of some importance, and we should like to consult the other members of the Court of Appeal.

*Cur. adv. vult.*

*May* 23. COLLINS, L.J.: We have had an opportunity of consulting the Master of the Rolls, and he agrees with us in thinking that the point which has been taken, that this appeal is in the nature of a motion for a new trial, is not well founded. The rule that security will not be required for the costs of a motion for a new trial of an action is somewhat anomalous. It is an incident of the old practice whereby the costs of a motion for a new trial as well as those of the original trial, were made to abide the result of the new trial, which practice, though still followed, grew up at a time when the Judge at *nisi prius* had no function but to assist at the disposal of the issue by a jury. There is no doubt as to the rule, but it is somewhat anomalous, and

we think it ought not to be extended to a case which is not strictly a motion for a new trial. The appellant must give security to the amount of £15.

STIRLING, L.J., concurred.

Solicitor for the appellant, *A. J. Harman.*

Solicitors for the respondent, *Wynne, Baxter, & Keeble.*

Also reported (1901) 2 K. B. 304; 70 L. J. K. B. 746.
See cases on this subject in Vol. I.

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June 26, 1901.

## BAILEY *v.* PLANT.

Before LORD ALVERSTONE, C.J., and LAWRANCE, J.

17 *T. L. R.* 449.

*Memorandum of Award—Award.*—SCHED. II. 8.

It is not necessary to forward a memorandum if the award itself be sent to the Registrar.

THIS was an appeal by the applicant against the refusal by Judge Yate-Lee, sitting at the Nantwich County Court, to make an order of committal of the respondent for non-payment of instalments due under an award under the Workmen's Compensation Act, 1897. The matter came before the Court of Appeal upon an appeal from the learned Judge on November 15, 1900. The Court, without deciding that the matter was one which was proper to be brought before them, decided that a County Court Judge had power to enforce such an award by means of an order of committal under sec. 5 of the Debtors Act, 1869. The decision is reported *post*, p. 209. Upon the matter coming back to the learned Judge he again refused to make the order, upon the ground that certain points on which he had relied

in his judgment had not been presented to the Court of Appeal. The questions turned on sched. 2, para. 8, of the Act, which provides that "where the amount of compensation under this Act shall have been ascertained . . . a memorandum thereof shall be sent . . . to the Registrar of the County Court . . . who shall . . . record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a County Court judgment." One of the points referred to by the learned County Court Judge was that this provision did not apply because no memorandum of the award had been sent to the Registrar or recorded by him in the register. It was admitted that the award itself had been so sent and registered. Another point was that the provision did not apply where the arbitrator was appointed by the Judge or the Judge himself acted as arbitrator, and that there was no other statutory provision for the enforcement by judgment summons of the award of such arbitrators.

*Minton-Senhouse* appeared for the applicant; the respondent did not appear.

The Court allowed the appeal.

The Lord Chief Justice said that if the language of the Act were read without attempting to draw subtle distinctions the matter was plain enough. He could not think that the Court of Appeal had overlooked the points referred to by the learned County Court Judge. To read the paragraph as he suggested would be to make it unworkable. The paragraph provided that a memorandum of the award should be accepted in order to prevent the necessity of sending the more formal document. The best memorandum of the award was of course the award itself.

Mr. Justice Lawrance concurred.

Solicitors: *Taylor, Hoare, & Pilcher*, for *R. R. Edlestone*, Crewe, for the applicant.

Also reported 17 T. L. R. 449.

November 15, 1900.

## BAILEY *v.* PLANT.

Before A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.

83 *L. T. R.* 459.

*Enforcing Award—Committal Order—Procedure.*—SCHED. II. 8.

An award may be enforced by a committal order under the Debtors Act, 1869.

An appeal against a refusal to enforce an award lies to the Divisional Court, and not to the Court of Appeal.*

THIS was an appeal from a refusal by the Judge of the Crewe County Court to make a committal order upon a judgment summons under the Debtors Act, 1869 (32 & 33 Vict. c. 62), sec. 5, which had been taken out against the respondent in certain proceedings in which the applicant claimed compensation under the Workmen's Compensation Act, 1897.

The case is reported in (1900) 2 W. C. C. 160.

The applicant had been a workman in the service of the respondent, and had suffered personal injury by accident arising out of and in the course of his employment.

He thereupon claimed compensation under the Workmen's Compensation Act, 1897.

The application under the Act was heard by an arbitrator.

On January 13, 1899, the arbitrator made his award, and directed the respondent to make one payment to the applicant forthwith, and also 2*s.* 6*d.* a week during the applicant's total or partial incapacity for work, or until further order.

The respondent made some payments under the award and then fell into arrear.

On February 12, 1900, the respondent being in arrear

* See footnote.

for eighteen weeks, making £2 5*s*. due, a judgment summons under sec. 5 of the Debtors Act, 1869, was taken out by the applicant, calling upon the respondent to show cause why he should not be committed to prison for his default in payment of this £2 5*s*.

On the hearing of the summons the County Court Judge said that he was satisfied by the evidence that the respondent had had ample means to pay the £2 5*s*. since it became due, and had refused or neglected to pay it; and he added that if the application were founded upon an ordinary judgment of the Court, he would make an order to commit the respondent. He held, however, that he had no jurisdiction to make a committal order, because in his opinion an application under sec. 5 of the Debtors Act, 1869, could not properly be described as a mode of enforcing a judgment, although in most cases in the County Court such an application resulted in the judgment being complied with. He thought that such an application is, in terms and in substance, for the punishment of a contumacious debtor, and that a committal order is not an imprisonment for debt, but an imprisonment for past dishonesty, since it might be made against a debtor who was penniless at the time of the order, and, even if made against a man then having means, nothing could be obtained from him by virtue of the order unless he chose to pay.

From this refusal to commit by the County Court Judge the applicant appealed to the Court of Appeal.

The Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), provides as follows:

Sched. 2, para. 8. Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee, or by an arbitrator, or by agreement, a memorandum thereof shall be sent in manner prescribed by rules of court, . . . to the Registrar of the County Court . . . who shall, subject to such rules, . . . record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a County Court judgment.

*Minton-Senhouse*, for the applicant: The County Court Judge had jurisdiction to make a committal order. [SMITH, M.R.: I do not feel at all clear that you have any right of appeal to this Court from a refusal by the County Court Judge to commit the respondent upon a judgment summons under the Debtors Act, 1869.] The question is one of law, and it arises out of an award under the Workmen's Compensation Act, 1869. The question is one of great practical importance, and there is a division of opinion among County Court Judges whether or not they have jurisdiction to make committal orders upon judgment summonses where a respondent has made default in payments which, under the Act of 1897, it has been awarded that he shall pay. [SMITH, M.R.: We will assume your right of appeal, and will hear what you have to say; but this must not be taken as a precedent.] I submit that a judgment summons is in fact a means of enforcing a judgment. Though commitment may be in the nature of punishment, it is also in the nature of a qualified execution, although the debt is not thereby satisfied. That is what was held by the Judges of the Court of Common Pleas in 1855, upon a question as to a judgment summons under the old Debtors Act of 1846 (9 & 10 Vict. c. 95): *Ex parte Dakins; Re Swan* v. *Dakins* (16 C. B. 77). Again, in a question arising under sec. 12 of the Bankruptcy Act, 1869, Mellish, L.J., said: "Now, arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt, he is entitled to be discharged": *Cobham* v. *Dalton* (L. R. 10 Ch. 655). He referred also to *Stonor* v. *Fowle* (58 L. T. R. 1; 13 App. Cas. 20).

No one appeared for the respondent.

A. L. SMITH, M.R.: For the purposes of the judgment which I am going to deliver I will assume that the Court has jurisdiction to hear and determine this appeal. Whether or not the applicant is entitled to appeal to this Court from the decision of the County Court Judge upon the judgment summons I express no opinion. The question that has

been submitted to us is one upon which, as I understand, there has been a conflict of opinion among County Court Judges. The question is, whether a judgment summons under sec. 5 of the Debtors Act, 1869, can be issued against a respondent who has failed to pay the weekly sum which an arbitrator under the Workmen's Compensation Act, 1897, has awarded that he should pay as compensation under that Act? That question depends on para. 8 of sched. 2 of the Workmen's Compensation Act, 1897, which provides that a memorandum of such an award when recorded by the Registrar of the County Court "shall for all purposes be enforceable as a County Court judgment." It seems to me that a memorandum which has been recorded under that enactment is for the purposes of its enforcement in the same position as a County Court judgment. One mode by which a County Court judgment can be enforced is by issuing a warrant to the bailiff to levy execution upon the goods of the judgment debtor. Another well-known mode by which the judgment debtor may often be coerced into obeying the judgment is the issuing of a judgment summons under the Debtors Act, 1869, which may be followed by an order committing him to gaol if he does not pay the sum he owes. But there is a restriction upon the power of the County Court Judge to commit the debtor to gaol, because before he makes the order of commitment he must be satisfied by evidence adduced before him that the debtor then has, or since the date of the judgment has had, the means to pay the sum due, and has refused or neglected or refuses or neglects to pay it. In the present case the learned County Court Judge was of opinion that an order of commitment upon a judgment summons was a process of a punitive nature, and was not a means of enforcing a judgment. I will assume that it is partly of a punitive nature; but, nevertheless, I think that it is also a means of enforcing the judgment of the Court. In fact, I believe that it is the only way in which, in the case of many small debts, the judgment of the

County Court can be enforced. I think a committal order upon a judgment summons is a means for enforcing a judgment of a County Court, and that the learned County Court Judge had jurisdiction to make such an order in the present case. The appeal must be allowed.

COLLINS, L.J.: I am of the same opinion. The process by which a debtor may be committed to gaol for non-payment of a judgment debt still continues to be what it was held to be in *Ex parte Dakins* (*ubi sup.*). In that case, in delivering judgment, Williams, J., said: "That satisfies my mind that the commitment is equivalent to an imprisonment under an attachment for nonpayment of a debt, or, in other words, that it is substantially civil process." The other Judges of the Court expressed similar views. The provisions of the old Debtors Act of 1846 were substantially the same as those contained in the Act of 1869 which is now in force. It seems clear to me that the real purpose of this process is to put pressure on the debtor and to make him pay the judgment debt. It is to be observed that he can always avoid imprisonment by paying the debt. That shows that the order of committal is not entirely punitive, because it is left in the choice of the debtor whether or not the order shall be carried out. Another thing to be noted is that it is a principle of the law that when a criminal has served his term of punishment his fault is purged, but in the case of a committal upon a judgment summons the imprisonment, by the express provisions of the Debtors Act, does not operate as a satisfaction or extinguishment of the debt. The debtor is punished, but his offence is not purged. That seems to me to show that one object of the procedure upon judgment summonses under the Debtors Act is to put pressure upon a debtor to make him pay the debt. It is true that this means of enforcing payment may not be made use of except in cases where the debtor is contumacious, but nevertheless an order of committal is in substance a means of putting pressure on the debtor and so enforcing the judgment of the Court, and

is not merely punitive. Imprisonment upon a judgment summons is robbed of two important factors of punishment, first, because the debtor can avoid it by paying the debt, and secondly, because serving the term of imprisonment does not free the debtor from his liability to pay the debt. I think for these reasons this memorandum was enforceable by committal under sec. 5 of the Debtors Act, 1869, and that the appeal must therefore be allowed.

STIRLING, L.J.: I am of the same opinion; but I have come to that conclusion with some hesitation, because at first I was much impressed by the reasoning of the learned County Court Judge. To a large extent that reasoning is well founded, because a committal order is partly punitive in its object. But we have to consider the meaning of the enactment in para. 8 of sched. 2 of the Workmen's Compensation Act, 1897, that a memorandum of an award when recorded "shall for all purposes be enforceable as a County Court judgment." In effect this memorandum directs the respondent to make certain payments to the applicant, and if these directions were embodied in a County Court judgment, there would be an order of the Court to which obedience was due from the respondent. The enactment that the memorandum shall for all purposes be enforceable as a County Court judgment was intended to give to the person in whose favour the memorandum operates all the means which can be made use of in a County Court in enforcing one of its judgments. I cannot agree with the opinion of the County Court Judge that a committal order under sec. 5 of the Debtors Act, 1869, cannot properly be described as a mode of enforcing a judgment. It seems to me that it is a mode in which a judgment creditor can obtain obedience from a judgment debtor to a judgment of the County Court, though it may be partly punitive. The learned County Court Judge has put too narrow a construction upon the words of para. 8 of sched. 2. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the applicant, *Taylor, Hoare, & Pilcher,* for *R. R. Edleston,* Crewe.

Also reported (1901) 1 Q. B. 31; 70 L. J. Q. B. 63; 83 L. T. R. 459; 49 W. R. 103; 17 T. L. R. 48.

*Johnson* v. *Adshead* ([1901] 2 W. C. C. 158) was also relied on.

This case was again appealed (see *ante*, p. 209), and was mentioned to the Court of Appeal, when it was held that the appeal lay to the Divisional Court.

---

July 8, 1901.

## BOWDEN *v.* BARROW BROTHERS.

### Before His Honour Judge Addison, K.C.

*The Times, July* 9, 1901.

*Referee appointed by Arbitrator—Attendance at Examination—Report—Privilege.*—Sched. II. 13.

The parties, other than the injured man, should not be allowed to attend the examination by a medical referee appointed by an arbitrator under Sched. II. 13.

The report of such a referee is intended for the use of the arbitrator only, but it is in the discretion of the arbitrator to allow the parties to see the report and to take a copy of it.

At the Southwark County Court, yesterday, his Honour Judge Addison, K.C., again had before him the case of *Bowden* v. *Barrow Brothers* in reference to a request by the respondents, Messrs. Barrow Brothers, to terminate an award of 12*s.* 6*d.* per week under the Workmen's Compensation Act to an old man of 70 named Bowden, who was injured while in the respondents' employ. His Honour had ordered Bowden to be examined by one of the medical referees under the Act, and he now stated that, as a result of the report of the medical referee, he was obliged to dismiss the application, with the result that the award

would continue. Mr. *Keeble*, solicitor, who appeared as representing Messrs. Barrow Brothers, asked for a copy of the medical referee's report, intimating that it might be of great use for the future. His Honour said that he could not allow a copy to be given. From a correspondence which he had received from the Home Office he had formed the opinion that such reports were privileged, and were only for the Judge. On Mr. Keble, however, citing a case in which he alleged a report to have been made public, the Judge said that he would definitely inquire whether a copy of the report could be furnished.

The above headnote incorporates information kindly supplied by his Honour Judge Addison, K.C., after further correspondence with the Home Office.

# INDEX.

ABOUT,
a vessel being finished 100 yards away from quay, 170
"near" shipbuilding yard, 170

ACCIDENT,
coal getting under skin, 21
effect of, on internal complaint, 23, 29, 33
knowledge of risk, 23
fortuity, 23, 29, 33
acceleration of disease, 192

ACTION,
payment of compensation bars, 58

ADAPTING FOR SALE,
turning grain into meal, 125
filling bottles with beer, 121

AGREEMENT,
implied, 50, 52, 54, 58
effect of request for arbitration on, 50
arbitration when compensation agreed and paid, 50

ANCILLARY OR INCIDENTAL,
cotton-spinner—putting in new driving wheel, 61
builders—demolition, 71

ANY OTHER WORK. *See* ENGINEERING WORK.

APPEAL. *See* DIVISIONAL COURT; COURT OF APPEAL.

APPRENTICE,
"earnings"; value of tuition, 194

ARBITRATION,
after settlement of claim, 50
if implied agreement, 52, 54, 58

ARISING OUT OF AND IN THE COURSE OF,
miner waiting at pit's brow, 37
disobedience; assisting fellow-workman, 40

ARTICLE. *See* ADAPTING FOR SALE.

ASSESSMENT. *See* COMPENSATION.

AVERAGE WEEKLY EARNINGS,
if less than two weeks, 1, 177, 185, 189
meaning of, 1
*See* EARNINGS.

AWARD. *See* COMPENSATION; MEMORANDUM; ENFORCING.

BUILDING,
party wall left standing, 71
height of, 67, 71, 121
measurement of, 67, 71
construction or repair of, 74, 121
a pit may be a, 121
connection with a building over 30 feet high, 121
machinery used in constructing, 121

CLAIM FOR COMPENSATION,
what is a, 56, 58

COMMITTAL. *See* ENFORCING AWARD.

COMPENSATION,
no power in courts to assess, 1
payment of, effect of, 50, 58
what is claim for, 56
period of, when accident accelerates disease, 192
during the incapacity which results from the injury, 192
original award may limit time for payment of, 192
measure of, 194
in respect of loss of earnings other than cash, 194

CONSTRUCTION,
of building, meaning of, 74
by machinery, 121
pumping water may be, 121

CONTRACTOR
is not a workman, 169

COSTS
of arbitration when claim admitted, 50
of appeal, 205

COURT OF APPEAL,
security for costs, 205
appeals to, in matters outside the arbitration, 202, 209

DEDUCTIONS
in estimating earnings, 173

DEMOLITION,
persons "undertaking," 71
of a building, 74

DISOBEDIENCE,
effect of, on course of employment, 40
when serious and wilful, 46

DIVISIONAL COURT,
appeals to, 202, 207, 209

DOCK,
ship in, 135
warehouse connected with, 143, 140

EARNINGS,
deductions from actual wages, 173
from other employers, 177
from "casual" employment, 177
for less than a week, 185, 189
tuition of apprentice, 194
considerations other than cash, 194
*See* AVERAGE WEEKLY EARNINGS.

EMPLOYMENT,
for less than two weeks, 1
commencement of; miner waiting at pit's brow, 37
meaning of continuous, 177

ENFORCING AWARD,
committal order, 209

ENGINEERING WORK,
meaning of "any other work," 121, 167
"railroad," 164
building a mill, 167

FACTORY,
machinery used in construction of building (pumping water), 121
for unloading, 146, 152
farm, 125
ship in dock, 135
quay; occupation of, 155
railroad, construction of; (signal box), 164
warehouse; yard, 140
connection with dock, etc., 143
premises occupied by beer dealers, 131
adapting article for sale, 125
meaning of expression "gain," 125

GAIN,
in sec. 93 of Factory and Workshop Act, 1878, means direct gain, 125

HEIGHT OF BUILDING,
measurement of, 67, 71
to be connected with another, 121

IMPLIED AGREEMENT. *See* AGREEMENT.

INDEPENDENT CONTRACTOR. *See* CONTRACTOR.

IN THE COURSE OF,
disobedience, 40
*See* ARISING OUT OF.

JUDGMENT SUMMONS,
enforcing award, 209

LOADING A VESSEL,
when complete; (hatchway), 1.

MACHINERY,
occupation of, 146, 152

MANUFACTURING PROCESS,
washing bottles by beer dealers, 131

MEASUREMENT. *See* BUILDING.

MEDICAL REFEREE,
attendance at examination by, 215
report of, discretion of arbitrator as to, 215

MEMORANDUM OF AWARD,
necessity for, 207, 209
enforcing, by committal, 209

MINER,
when employment begins, 37

MISCONDUCT. *See* SERIOUS AND WILFUL.

NEAR
a shipbuilding yard, 170

NOTICE OF INJURY
is not a claim, 56

OCCUPIER
of machinery, 146, 152
of a quay, 155

ON, IN, OR ABOUT. *See* ABOUT.

PART OF OR PROCESS IN. *See* ANCILLARY.

PARTY WALL. *See* BUILDING.

QUAY,
occupation by ship, 155

RAILROAD,
meaning of, 164,

REFEREE. *See* MEDICAL REFEREE.

REPAIR,
meaning of, 74, 104

SCAFFOLDING,
meaning of, 74, 113
whether question of fact, 74, 113
what amounts to, 74, 113, 121

SERIOUS AND WILFUL MISCONDUCT
disobedience, 46

SHIP
in dock, 135

SHIPBUILDING YARD,
when ship near to, 170

TRADE,
farming is not, 125

UNDERTAKER,
meaning of "undertaking," 71
occupier of machinery, 146, 152
quay, 155

UNDERTAKING,
meaning of, in sec. 7, 2, "Undertakers," 71

WAREHOUSE,
meaning of, 140, 143
railway goods yard, 140
shed, 140
connection with dock, wharf, or quay, 143

WORKMAN,
a contractor is not a, 169

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